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WHISTLEBLOWER PROTECTION ACT OF 1987

HEARINGS

BEFORE THE

SUBCOMMITTEE ON FEDERAL SERVICES,
POST OFFICE, AND CIVIL SERVICE

OF THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 508

TO AMEND TITLE 5, UNITED STATES CODE, TO STRENGTHEN THE PROTECTIONS AVAILABLE TO FEDERAL EMPLOYEES AGAINST PROHIBITED PERSONNEL PRACTICES, AND FOR OTHER PURPOSES

JULY 20 AND 31, 1987

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CONTENTS

Page
Opening statements:
    Senator Pryor 1, 59
    Senator Stevens 64

WITNESSES

Monday, July 20, 1987

Hon. Carl Levin, U.S. Senator from the State of Michigan 3
Hon. Charles E. Grassley, U.S. Senator from the State of Iowa 5
Harold Hipple, former Veterans' Administration Hospital Police Officer, Cincinnati, OH, accompanied by Thomas Carpenter, Counsel, Government Accountability Project; and Joseph D. Whitson, Jr., former employee, U.S. Air Force, San Antonio, TX 8
Mary E. Brothers, M.D., former surgeon, Veterans' Administration Hospital, Leavenworth, KS; and Lawrence Timothy Reid, Engineer, U.S. Navy, San Diego, CA, accompanied by John K. Shiposki 31
Donald R. Soeken, Ph.D., Association of Mental Health Specialties, Washington, DC; and Edward E. Wright, Whistleblower Coalition, Washington, DC 50

Friday, July 31, 1987

Thomas Devine, Legal Director, Government Accountability Project; and Loeb Julie, President, Coalition to Stop Government Waste 61
Mary Wieseman, Special Counsel, Office of Special Counsel 74
Llewellyn M. Fischer, General Counsel, Merit Systems Protection Board 97

Alphabetical List of Witnesses

Brothers, Mary E., M.D.:
    Testimony 31
    Prepared statement with attachments 186
Carpenter, Thomas: Testimony 8
Devine, Thomas:
    Testimony 61
    Prepared statement with attachments 242
    Memorandum for Mr. A. Fitzgerald, Management Systems Deputy, from Lt. Gen. Claudius E. Watts III, USAF, July 30, 1987 298
    Responses to written questions submitted by Senator Pryor 331
Fischer, Llewellyn M.:
    Testimony 97
    Prepared statement 425
    Responses to written questions submitted by Senator Pryor 430
Grassley, Hon. Charles:
    Testimony 5
    Prepared statement 148
Hipple, Harold:
    Testimony 8
    Prepared statement 152
Julie, Loebe:
    Testimony 61
    Prepared statement 341
    Responses to written questions submitted by Senator Pryor 350
Levin, Hon. Carl: Testimony 3

Page

Reid, Lawrence Timothy:
  Testimony 31
  Prepared statement 204
Shiposki, John K.:
  Testimony 31
  Prepared statement with an attachment 209
Soeken, Donald R., Ph.D.: Testimony 50
Whitson, Joseph D., Jr.:
  Testimony 8
  Prepared statement 167
Wieseman, Mary:
  Testimony 74
  Prepared statement with attachments 356
  Responses to written questions submitted by Senator Pryor 403
Wright, Edward E.:
  Testimony 50
  Prepared statement with attachments 217
  Responses to written questions submitted by Senator Pryor 236

APPENDIX

Text of S. 508 103
Prepared statements of witnesses as they appeared, with attachments and responses to written questions 148
Statements and letters submitted by:
  Department of Justice 433
    Responses to written questions submitted by Senator Pryor 456
  Office of Personnel Management 459
    Responses to written questions submitted by Senator Pryor 468
  Administrative Office of the United States Courts 471
  American Bar Association 473
  American Federation of Government Employees (AFL–CIO) 483
  Bill Bush, former National Aeronautics and Space Administration whistleblower 488
  Federal Bar Association 495
  A.E. Fitzgerald 507
  Passman and Broida, Attorneys at Law 519
  Floyd J. Stanek, Ph.D., P.E 526
"A Survey of Whistleblowers: Their Stressors and Coping Strategies," by Karen L. Soeken, Ph.D., and Donald R. Soeken, Ph.D 537

WHISTLEBLOWER PROTECTION ACT OF 1987

MONDAY, JULY 20, 1987

U.S. Senate,
Subcommittee on Federal Services,
Post Office, and Civil Service,
Committee on Governmental Affairs,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10 a.m., in room SD-342, Dirksen Senate Office Building, Hon. David Pryor, Chairman of the Subcommittee, presiding.

Present: Senators Pryor, Grassley, and Levin.

OPENING STATEMENT OF SENATOR PRYOR

Senator **Pryor**. Good morning ladies and gentlemen. The Subcommittee will come to order.

I would like this morning to welcome the witnesses, many of whom have traveled a very long way. I would also like to apologize that we had to forego an earlier hearing. I understand one of the witnesses even came a very long way to a non-hearing, and I do apologize for this.

I would also like to recognize the participation in this hearing of two of the Senate's leaders in whistleblower protection—Senator Levin of Michigan and Senator Grassley of Iowa.

Today this Subcommittee begins its review of protections available to those who blow the whistle on fraud, waste and abuse. These are the men and women who have the courage of their conviction—conviction that corruption and fraud or inefficiency have no place in our Government.

As four witnesses will attest to today, in the cruel world of the bureaucracy, most Government whistleblowers can expect extraordinary efforts by their own agency to shut them up, to discredit them, or to eliminate them. In most cases, they can also expect little protection from the Inspectors General or from the agency Congress created to help and protect whistleblowers, the Office of Special Counsel [OSC].

Who can forget the retaliations that crushed Earnest Fitzgerald, the Air Force analyst who bucked the Air Force brass to expose massive cost overruns on the C-5 military transport in 1969. As a reward for his efforts to save the taxpayers millions and millions of dollars, what happened to Ernie Fitzgerald? He was fired. After spending hundreds of thousands of dollars in legal fees, Mr. Fitzgerald was reinstated in the Air Force, but retaliations seem to continue even to this day, 18 years later.

In 1978 Congress created an administrative process to protect whistleblowers. In short, Congress set up the Office of Special Counsel, the OSC, to provide protection for whistleblowers against whom an adverse personnel action was taken. The OSC was to plead the whistleblower's case for the new Merit Systems Protection Board.

Whether the 1978 system provides adequate protection for whistleblowers is a question that these hearings will try to answer today. Are whistleblowers today confident that they will be shielded from reprisals after their disclosure? Do the administrative process and the Special Counsel encourage or discourage Government workers to want to report fraud or abuse?

A valid question for all of our witnesses today is this: "Knowing how you have been treated as a whistleblower, what would you tell a friend or a fellow employee who feels compelled to blow the whistle?"

I think most will say, "Whistleblowers beware, you are headed for trouble, and you will find yourself out there all alone."

It is certainly a sad state of affairs if this is where we find ourselves 9 years after Congress passed its grand plan to protect persecuted workers. I fear that the word is out—Government is a whistleblower-beware environment.

The question then becomes, "Is the whistleblower protection system itself involved, or have the presidential appointees and other high-level officials subverted the system?" Wherever the fault lies, we must then ask, what can Congress now do to correct the situation?

Senator Levin, with the support of Senator Grassley and others, has introduced excellent remedial legislation. The bill, I think, is a good starting point for this Subcommittee's work as an appropriate framework considering the experiences and suggestions of our witnesses.

Today we are going to hear from Senators Levin and Grassley, then from four whistleblowers who have experienced reprisals for their actions, and from a professional outside of Government who works with whistleblowers.

In our next hearing, the Subcommittee will hear from the Office of Special Counsel, the Merit Systems Protection Board, the Department of Justice, the Office of Personnel Management, and two whistleblower advocacy groups.

One last point, ladies and gentlemen, before we begin. Recently four IRS employees testified at a hearing of the Senate Finance Subcommittee on IRS oversight that I chair. Today there are indications that some of those witnesses may now be experiencing harassment in their particular jobs. I hope that this is not the case. I find this possibility most distressing.

It appears that we have problems not only with the procedures established in 1978 but also with the failure of some officials to comply with the underlying law, Title 5 of the United States Code, which states: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a Committee or a Member thereof, may not be interfered with or denied."

Many also seem ignorant of Public Law 96-303. We have enlarged it for you, the section that we find pertinent today, which specifically charges Federal employees to, quote: "Expose corruption wherever discovered."

With that, let me begin this hearing by welcoming our first two witnesses and ask that in the interest of allowing everyone to be heard today, witnesses try to keep their initial statements as close to 5 minutes as possible. Of course, questions will pursue after the statements, and longer written statements and supporting documents will be submitted and printed in the record of this hearing at the appropriate point.

First, as we have introduced already, Senator Carl Levin of Michigan, who has been on the forefront of whistleblower protection, and then followed by Senator Chuck Grassley of Iowa, who also has been a leader in this fight.

Senator Levin.

TESTIMONY OF HON. CARL LEVIN, U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Mr. Chairman, first let me say that the entire country is in your debt for what you are doing here today and in the second hearing that you are going to be holding. You have been a fighter to protect whistleblowers and we believe that there is going to be some concrete legislation that results from your efforts, and everybody is very much in your debt for what you are doing.

I personally am grateful to you for holding these hearings on S. 508, the Whistleblower Protection Act of 1987, which I introduced, along with Senator Grassley as my principal cosponsor. It now has 15 other cosponsors on a broad bipartisan basis. Senator Grassley, as you have indicated, has been in the forefront of Congressional efforts to protect whistleblowers for the many years that he has been in the Senate.

Mr. Chairman, an astounding 70 percent of Federal employees who claim direct knowledge of waste, fraud and abuse in the Government choose not to report it, according to the 1980 and 1983 studies conducted by the Merit Systems Protection Board, the MSPB. The main reason given for this reluctance to report problems was the belief that nothing would be done to correct the problem. The second most frequently cited reason was the fear of reprisal. Twenty percent of employees in 1980 said that the reason they were not reporting wrongdoing was fear of reprisal. By 1983, that number had almost doubled to 37 percent.

These statistics are a serious indictment of our Government's stated commitment to fairness and efficiency. They show that we have utterly failed to convince employees that they will be rewarded rather than punished if they disclose Government wrongdoing. This is in spite of the fact that in 1978 the Congress established the Office of Special Counsel as part of the MSPB and charged it specifically with the task of protecting whistleblowers from improper reprisals.

There are several possible explanations for this widespread concern of Government employees, including the possibility that our system as a whole may simply be too resistant to change, that agencies and managers and Inspectors General throughout the Government are sending out the wrong message to employees.

However, the OSC itself, the Office of Special Counsel must bear a large measure of responsibility for the current situation, given the role that Congress has assigned to it. For instance, look at the attitude that some Special Counsels have brought to the job. William O'Connor, who held the position for almost 4 years, was reported as warning potential whistleblowers that: "Unless you are in a position to retire or are independently wealthy, don't do it. Don't put your head up because it will get blown off."

The same Mr. O'Connor, the same Special Counsel that we put in charge of protecting whistleblowers, said that he would not file a complaint with the Merit Systems Protection Board unless there was, "a virtual certainty" of success and he constantly emphasized that he had no obligation to individual employees, but rather his sole obligation was to the, "merit system." Such statements most assuredly do not instill confidence in employees who are contemplating risking their careers to report Government abuses.

Another explanation for these statistics could be the consistent failure of the OSC to exercise fully its authority to seek stays or corrective action on behalf of employees. Ninety-two percent of complaints received by the OSC receive no in-depth investigation, according to the General Accounting Office just a few years ago. The GAO also reported that 99 percent of complaints the OSC receives of reprisal for whistleblowing are closed without any action being initiated by the OSC.

Further, in the last 4½ years, the OSC has requested the Merit Systems Protection Board to order stays of adverse personnel actions on behalf of only 10 employees—10 employees in 4½ years.

The legislation that we have introduced goes a long way towards addressing these problems. S. 508 establishes in statute that the OSC's primary role is to protect employees, especially whistleblowers, from prohibited personnel practices. It clarifies that reprisal cannot play any part in a personnel action against employees. Right now if reprisal is found to be a secondary reason for the action against an employee, it is tolerated. Our bill would change that. It would not permit reprisal to play any role in a personnel action against employees.

Our bill would allow employees whose cases are rejected by the Office of Special Counsel to appeal further to the full Merit Systems Protection Board. And it strengthens the Office of Special Counsel by making it independent from the Merit Systems Protection Board and granting it litigating authority, which it does not now have.

I am pleased to say again, Mr. Chairman, that this legislation has garnered broad bipartisan support. All of us in Congress have spent considerable effort trying to reduce the cost of and improve the functioning of our Government. But it is simply self-defeating for us to be concerned about problems in our Government, whether it be cost overruns in the procurement system or breakdowns in our air traffic system, or the overall deficit itself, without taking the very basic step of encouraging and protecting individuals who have first-hand knowledge of such problems and who are willing to step forward.

If we are going to achieve a more honest and efficient Government, it is essential that we restore confidence in Federal employees that their Government will respond in an ethical and responsible manner whenever they disclose wrongdoing. That is the purpose of this bill.

We are delighted and grateful to the Chairman and other members of this Subcommittee for the hearings which you are holding on this bill and on the general problems that whistleblowers face when they are willing to take risks on behalf of taxpayers and citizens. We want to encourage them to do that, to come forward. Right now, I am afraid there are disincentives which we have got to eliminate if we are going to have whistleblowers protected and if we are going to realize the savings that can result to our Treasury.

I thank you again, Mr. Chairman.

Senator PRYOR. Senator Levin, thank you.

Senator Grassley?

TESTIMONY OF HON. CHARLES E. GRASSLEY, U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Mr. Chairman, here, first of all, is a copy of my longer testimony.

Senator PRYOR. Your full statement will be placed in the record.[1]

Senator GRASSLEY. Mr. Chairman, I want to thank you for this opportunity to testify this morning on an issue of momentous importance, which is the welfare of Government whistleblowers, as well as a measure which will improve the procedural protection for many civil servants, and we have dubbed this the Whistleblower Protection Act of 1987.

I am pleased to join my friend and distinguished colleague and principal author of the bill, Senator Levin, both in testimony and cosponsorship of this needful legislation. Senator Levin has demonstrated astute leadership in this area for many years and has developed a valued expertise with respect to strengthening protection of Government whistleblowers.

In addition to my complimenting Senator Levin, Mr. Chairman, I also wish to commend you for your support and leadership in the protection of our Federal workers. Both of you gentlemen know that if we want integrity in Government, we cannot punish those who show integrity. It is that simple.

You and I, Mr. Chairman, have faced many battles together fighting the Administration on behalf of whistleblowers, and although we are members of different political parties, we are on the same side in opposition to a system fraught with cracks and flaws and badly in need of repair. I appreciate the opportunity to express my views before your Subcommittee, because I want to encourage you to take a serious and discerning look at the Whistleblower Protection Act of 1987 in the context of the vulnerabilities of whistleblowers to retaliation and unfair treatment.

My remarks today will attempt to provide a general understanding of why this bill is necessary. There is no vain assumption in saying that progress has been made in recent years to protect and encourage whistleblowers. The fact that some of us in Congress who feel deeply about this issue have continued to give this a high profile in and of itself has given whistleblowers some hope, although not enough.

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[1] See p. 148.

Vigilance and mere recognition that Administrations seem to have a natural propensity to devour whistleblowers are indispensably necessary and a precondition for encouraging whistleblowing.

In terms of legislation, Congress last year took a giant step forward and advanced our laws to those of the days of Abraham Lincoln with respect to fighting fraud against the Government. Our False Claims Reform Act of 1986 now allows private citizens who know of fraud against the Government, just as in the days of Abraham Lincoln, to bring legal suits on behalf of the Government and collect a percentage of the damages.

While it is not necessary, indeed not honorable, to entice Government employees with such monetary incentives, we must nonetheless provide equal and far-reaching protections and incentives for Government employees to do their jobs as honestly and effectively as possible on behalf of their public, and that, Mr. Chairman, is what this bill is intended to do.

Under this legislation, a window would be created within the Administrative Law system for Federal workers to take their cases to the Federal courts, either through appeal or through the Office of Special Counsel acting as attorney.

Certainly, Mr. Chairman, this feature of the bill would provide an advantage for otherwise frustrated whistleblowers throughout our Government. Senator Levin has articulated the bill's other salient features. It is our hope that through the coming weeks we can refine this legislation as needed while it moves through the legislative process, beginning with today's hearings, and as with any legislation, this bill is by no means a panacea, but it does provide substantial protection for whistleblowers in a contextual way that does not exist in current law.

These are changes, Mr. Chairman, much needed in an environment in which the Administration is seemingly engaged in a multiple thrust attack on all fronts against whistleblowing. Under current law, the whistleblower's only hope is like the desperate Charge of the Light Brigade, and there are rarely any survivors, as you know.

As a case in point, there is currently another assault being waged on the flanks of civil servants. I am referring to the requirement for Government employees to sign SF-189, the Classified Information Nondisclosure Agreement. I flamed amazement when I learned of the Administration's attempt to hold civil servants accountable and, Mr. Chairman, liable as well for legitimate disclosures of unclassified information which may then be classified after the fact.

If I could correct an earlier remark, this surely is not an assault on the flank. It is a full-fledged frontal assault. Form SF-189 is in direct conflict with the Whistleblower Protection Law as passed in the 1978 Civil Service Reform Act, and I believe we will hear testimony this morning from much more qualified experts than I am on this matter.

Several of us in Congress, including yourself, Mr. Chairman, have written to Administration officials asking that the requirement to sign SF-189 be suspended. I hope that we can work together with others of our colleagues to thwart this assault against whistleblowing.

I have provided more details regarding this matter in my written testimony. These and other assaults on the rights of civil servants are the best testimony, Mr. Chairman, of an imperative need for this act that Senator Levin and I have already introduced. It is my hope that we can work with you and your Subcommittee to improve this bill and provide maximum protection for those who fulfill one of the most crucial needs in all of public service.

I want to congratulate my colleague, Senator Levin, again for his excellent work in crafting this bill, and I commend you, Mr. Chairman, again, for your obvious and deep concern for the welfare of the whistleblowers in our Federal Government.

I look forward to a fruitful working relationship with your Subcommittee.

Thank you, Mr. Chairman.

Senator PRYOR. Senator Grassley, thank you.

On behalf of the Subcommittee, I would like to invite both of our Senators—Senator Levin and Senator Grassley—to join me this morning in listening to our witnesses and to participate in the questioning of our witnesses.

I know Senator Levin is prepared to do so. Senator Grassley, is it possible you could join us?

Senator GRASSLEY. I am going to spend a half hour or so at the Special Committee on Aging, but I expect to come back.

Senator PRYOR. Actually, Senator Grassley, in a few moments I am going to have to go to the Special Committee on Aging and we are going to let Senator Levin Chair this hearing for a while. So if you will go up there, I will join you shortly just for a few minutes at the Aging Committee.

By the way, before Senator Grassley leaves, Senator Levin, I would just like to make mention of something that gained my admiration for our colleague, Senator Grassley. Several years back an issue was raised in the Department of Defense about an analyst—a very honest analyst—I think his name was Spinney, Chuck Spinney.

Senator Grassley was having difficulties in getting the DOD to allow Mr. Spinney to come to the Congress and testify about some of the real and some of the other costs for our weapons systems that we are now procuring. So finally in frustration and curiosity, Senator Grassley got in his car one cold winter morning and drove over to the Pentagon and started looking for, and ultimately found, Mr. Spinney. Senator Grassley had an interview with him right there. I think it was not encouraged by the higher officials at the DOD for you to do this. I want to commend you for that, and I will always remember that trait about you that you are going to find information and tell it like it is, Senator Grassley, as this applies to Senator Levin.

Senator GRASSLEY. Thank you.

Senator PRYOR. Our first witnesses this morning are going to be Mr. Harold Hipple and Mr. Joseph Whitson. Please come forward.

Mr. Hipple, you are accompanied by Mr. Carpenter?

Mr. **Carpenter**. Sir, I am with the Government Accountability Project and I am representing Mr. Hipple for today. I do not have a statement.

Senator **Pryor**. Thank you, sir.

Mr. Hipple is a former security guard at the Veterans' Administration Hospital in Cincinnati, Ohio. With other officers he reported police brutality by his superior. All of the officers were retaliated against and what happened to Mr. Hipple? Mr. Hipple was fired.

Mr. Hipple's story is of particular interest because it has not been heard before. As part of his settlement with the Veterans' Adminstration, Mr. Hipple agreed not to talk to reporters or to lawyers about this case. That was a gag order, and I should point out, this particular gag order does not apply to testimony before Congress or one of its Committees.

For the record, let me state this morning that this Subcommittee duly requested that Mr. Hipple testify here today, and he is accompanied by Counsel, Mr. Tom Carpenter.

Our second witness is Mr. Joseph Whitson of San Antonio, Texas. He is a former civilian chemist for the U.S. Air Force who was retaliated against after testifying in a court case.

Gentlemen, we thank you for coming this morning, and let us hear first from Mr. Hipple. We are going to try to keep our statements in the area of 5 minutes each. If you go over that we are going to be a little bit lenient, but hopefully you can keep those statements to about 5 minutes. That will afford us the opportunity to ask you some questions and you can expand on your statement. It goes without saying that the full text of your statement will be published in the record.

Mr. Hipple.

TESTIMONY OF HAROLD HIPPLE, FORMER VETERANS' ADMINISTRATION HOSPITAL POLICE OFFICER, CINCINNATI, OH,[1] ACCOMPANIED BY THOMAS CARPENTER, COUNSEL, GOVERNMENT ACCOUNTABILITY PROJECT; AND JOSEPH D. WHITSON, JR., FORMER EMPLOYEE, U.S. AIR FORCE, SAN ANTONIO, TX [2]

Mr. **Hipple**. Mr. Chairman, thank you for requesting my testimony today as part of your investigation into the civil service whistleblowers protection laws. I am pleased to appear.

My name is Harold Hipple. For 5 years I was a Veterans' Administration police officer and supervisor. With me is my attorney, Tom Carpenter, from the Government Accountability Project. I have come to testify against police brutality instigated by Cincinnati VA Medical Center Chief Daniel Wilson and of my disillusionment with the Office of Special Counsel since I came forward.

During my 35 years of law enforcement experience with the military police CID, the Cincinnati Police Department, and the VA Police, I have been proud of the job and believed deeply in my public service mission. The Chief's brutality and the Special Counsel's cover-up are the type of lawlessness that I thought police were supposed to protect the public against. This testimony summarizes my now complete disclosure for your investigation which is enclosed for your record.

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[1] See p. 152 for Mr. Hipple's prepared statement.

[2] See p. 167 for Mr. Whitson's prepared statement.

In February 1985, Mr. Wilson became Chief of Service at the Cincinnati Medical Center. Stories of Wilson's brutality soon began circulating among the officers. That November I personally witnessed him abuse John Shives, a veteran being treated at the VA on an outpatient basis. Mr. Shives parked illegally. Despite an officer's order that he move his van, Mr. Shives went into the hospital to register for shots. When he returned I informed him that the officer would issue him a tag.

Mr. Shives disagreed but remained calm. When Mr. Wilson arrived, however, the confrontation became hostile. Wilson immediately began shouting to Shives' face, provoking him by calling him "dirt bag," "scum ball," and "dirty bastard, etc." Wilson then grabbed Shives and tried to kick his legs out from under him, but in the process also kicked me, causing a blood vessel to burst in my legs.

As Shives was wrestled to the ground, Wilson choked him and gouged him in the eyes. Shives was screaming in pain and Wilson continued to abuse him in this manner for several minutes. Because John Berter, two other officers, and I became extremely concerned about this type of activity and brutality, in November of 1985 we drafted an anonymous letter relating the incidents of brutality that we had seen. Over 100 of these letters were sent to various groups and agencies such as the FBI, civil rights organizations, Congressmen and Senators.

Somehow Wilson also obtained a copy of the letter and immediately suspected me as being the author. I soon became the target of grossly trumped up charges and was fired in May of 1986. On May 27 I appealed. The VA was forced to effectively acknowledge that they had no case against me and on September 15 settle with me on terms with which I am extremely pleased.

Nevertheless, Wilson continues as Chief of Service at the Cincinnati Medical Center because according to him, he has friends in influential places. In a January 15, 1986 meeting for all officers, Chief Wilson threatened the author of the anonymous letter to the FBI by announcing that Mr. Daly of the FBI is a personal friend of his, and that Mr. Fazone, the VA Chief in Washington, is his mentor. And that both Fazone and the directors of the Cincinnati Hospital are completely behind him. He added that he would not be hurt, but the author of the letters would be sent walking down the road.

Unfortunately, Mr. Berter also went to the Office of Special Counsel for help. The OSC has acted as Chief Wilson's shield against whistleblowers. To illustrate, when I later told an OSC investigator, Vince Russell, about the statements which Wilson had made at that meeting, Russell immediately became indignant and said: "Do you mean to insinuate that there has been a cover-up by an FBI agent? This is a very serious charge and you had better be able to back it up."

I was amazed at how quickly Vince Russell had forgotten about Chief Wilson and began accusing me. I was only quoting Chief Wilson.

Our experience with the OSC has been one of total frustration. In May of 1986 Berter contacted the OSC, but it was not until early September, just before my settlement, that they arrived on the scene and interviewed us. During that time our careers were ruined and our lives became a nightmare.

In the interview, which lasted 1½ hours, the OSC investigator took no sworn statements nor did he press for details. After the initial interview, nearly all of our communication was a one-way street from us to them. In the meantime, Mr. Berter and Mr. Hadley had continuing harassment made upon them by Chief Wilson.

Apathy seems to be the OSC's main positive reaction to whistleblower's complaints. When I informed the OSC about Chief Wilson's practice of hiring unqualified friends without posting a vacancy notice, the OSC investigator did not comment, nor did he follow through in this matter. The buddy system is illegal under the Merit System.

Then, OSC investigator Vince Russell gave misleading advice to one officer, who needed help. This officer, whom I should call Officer A, required a transfer to another hospital facility because of a family problem compelling him to move closer to his wife. However, Chief Wilson denied Officer A the transfer and in fact failed to share a vacancy announcement with him.

Wilson and an aide then began leaving threatening phone messages telling the Officer A to resign if he had family problems. Wilson even entered Officer A's apartment with a spare key, took his TV set and left him a note saying that he owed Wilson money and he must be in to resign.

The colleague who told me about the Officer A asked for my advice on how to help him. I suggested that Officer A contact Vince Russell. Vince Russell took the note and the tapes and then told Officer A not to fight it, but rather to resign and the OSC would take care of him. He resigned and sacrificed his rights.

I thought that OSC were not supposed to give advice. He disappeared then, outcome unknown, as to whether he ever received any help.

I feel that the OSC is a grave threat to the whistleblower effort because it is like a wolf in sheep's clothing. It entices a needy whistleblower with hope and then kicks their legs out from under them. The sad state of our justice system today makes me ask, doesn't anyone care? The OSC could get Mr. Berter's job back while their investigation is pending, but it has not.

The most significant OSC misconduct may be that of misrepresenting the work of another Government agency, the FBI. I am informed that the OSC has told Congress in briefing that the FBI does not support our whistleblower charges. However, Agent Mike McDaniels of the FBI told me just the opposite. He stated that his 75-page report in which brutality against at least 10 victims was stated had been sent to the Justice Department in Washington.

Agent McDaniels also told me at a later date that he was not getting much response from the Justice Department but that he wanted to keep taking evidence because he knew it was a prosecutable case. Unfortunately, however, the law breakers have not been brought to justice.

Since I have already settled, I have nothing to gain for myself. I testify today only because I desire to help real public servants like Mr. Berter and Mr. Hadley who are still unemployed due to Chief Wilson's retaliatory action against them.

The Office of Special Counsel has offered nothing but false hope and misery.

I thank you.

Senator **Pryor**. Mr. Hipple, thank you for your statement.

Senator Levin, I am going to ask a few questions of Mr. Hipple. Then we will allow Mr. Whitson to make his statement. However, you go ahead also, if you have questions of Mr. Hipple, then I will go to the Aging Committee and will turn Mr. Whitson over to you, if that is all right.

First, Mr. Hipple, I think you stated this but for the record, is the Chief of Security, Mr. Wilson, still at work at the VA Hospital where this incident occurred?

Mr. **Hipple**. Mr. Wilson has been at work. He was never suspended. He continues to be in charge down there running the VA Police Service.

Senator **Pryor**. Was he ever reprimanded?

Mr. **Hipple**. He was never reprimanded. However, the four officers who wrote the letter have been all eliminated, except one has been reinstated due to another action.

Senator **Pryor**. Are you saying that no one from the Office of Special Counsel has disciplined anyone at the VA Hospital or ordered any corrective actions whatsoever, is this correct?

Mr. **Hipple**. No one has done anything for any of us. The person helped by this seems to be Mr. Wilson, who is being shielded.

Senator **Pryor**. Who is being what?

Mr. **Hipple**. Wilson is being shielded from the whistleblower charges.

Senator **Pryor**. You state that you passed along information and potential witnesses to the Special Counsel in the case against Mr. Wilson. How did the Special Counsel handle the information and the witnesses that you gave them?

Mr. **Hipple**. I am very frustrated. To my knowledge, nothing has been done. The witnesses that were furnished were not contacted. However, just recently the investigator, Vince Russell, and another investigator from the IG office have returned to the VA from their initial investigation and have talked to some of the officers down there.

I would like to make mention of this because it is the same type of a threatening environment that we were all exposed to. The investigators talked to this officer in a room provided by Mr. Wilson in his trailer office where the walls are paper thin. It is a temporary trailer. The officer told me he could hear Chief Wilson and his colleagues talking through this paper-thin wall and he felt very much under duress in answering the investigator's questions, who was talking very loud.

He stated this to the man. That he felt very threatened in this position, giving his answers. He knew Chief Wilson could hear what he was saying. After a long period of time, the investigator said, well I guess we can ask Chief Wilson to maybe get us another room to talk in. At this point they made him feel kind of ashamed of himself and he answered the questions as brief as possible during this interview.

Senator **Pryor**. Mr. Hipple, how many years have you been in police work?

Mr. **Hipple**. I have been in police work a total of 35 years.

Senator **Pryor**. Now, you have worked with many attorneys during this time, and more specifically, many, many prosecutors during this period of time—3½ decades?

Mr. **Hipple**. Yes, sir. I have probably been in court many thousands of times.

Senator **Pryor**. Mr. Hipple, how would you compare the OSC staff—the prosecutors and attorneys—with other prosecutors that you have worked with in the private world?

Mr. **Hipple**. My personal opinion on the investigation that was conducted by the OSC was a very negative one. I have never seen an investigation in all my years in law enforcement of being a Cincinnati Police Officer, especially an investigator for years, I have never seen an investigation conducted in this manner, where witnesses were not interviewed initially to gain more information to get all the facts and determine what they were after before getting into the active investigation of proof finding.

I have never seen an investigation of this type in my life.

Senator **Pryor**. Were affidavits taken by OSC? Were affidavits taken from potential witnesses?

Mr. **Hipple**. There were no written statements taken, even from us, at any point in time. I have never written a statement and they have never asked for or taken a statement.

Senator **Pryor**. What about Officer Wilson? Was an affidavit taken from him by OSC?

Mr. **Hipple**. I have no knowledge of that.

Senator **Pryor**. Now, Mr. Hipple, could you elaborate on your mention of an incident which involved a former friend of Chief Wilson. In your statement I believe you refer to him as Officer A. Could you explain how it applies to the effectiveness of the Special Counsel about the situation involving Officer A?

Mr. **Hipple**. A colleague of mine who does not want to be identified at this time, who still works for the VA and feels very much threatened by the fact that Wilson is still there came to me and requested that I help. Officer A, who had a wife in another part of this country working at a Government facility, requested a leave of absence but he was only threatened and told to resign if he had family problems he could not handle, he was not going to get a transfer.

Wilson would not give him a leave of absence that he requested over a long period of time. He only continued to threaten him with these threatening messages on his answering machine. Both Mr. Wilson and one of Wilson's aides continued to threaten this man over a long period of time.

The colleague of mine got involved because Officer A became very distraught over this because he and his wife were to the point of getting a divorce because they had no time together. This subject, Officer A, was at a point where he was suicidal from this harassment that Chief Wilson was giving him. He asked my advice as he received no help from the Chief, and I advised him to talk to Russell at that time.

I still had some confidence in Mr. Russell and the OSC at that point in time. He did in fact contact him and was given what I consider bad advice for him to resign and that the OSC would take care of them. I did not feel that this was their job to give advice. Ms. Durbin had told me they could not give me advice, that they were not my counsel and could not act in a counsel/client relationship or give advice.

Senator **Pryor**. When you witnessed the incident of Chief Wilson's alleged beating of the veteran in the parking lot, did you report this to the Office of Special Counsel?

Mr. **Hipple**. Not initially. We tried to remain in the background. We felt very threatened and in November we did write the letter, hoping that this would come to the attention of the proper authorities by distributing 100 of those letters.

Senator **Pryor**. To whom did you write the letter?

Mr. **Hipple**. We wrote the letter and addressed it to people that we felt could do something about it. The Office of Special Counsel was not one. The Inspectors General Office was one of them. The FBI, like I said; approximately 10 Senators and Congressmen; and various other organizations, veteran groups and organizations.

Senator **Pryor**. Now, ultimately, how did you make contact with OSC, the Office of Special Counsel?

Mr. **Hipple**. I made personal contact after Mr. Berter became involved with them in May. He had written and told them about his, problems and I, at a later date, later than May, also contacted them and became involved with OSC. But it was not until September that I heard from them, just days before my settlement.

Senator **Pryor**. That was my next question, Mr. Hipple. What did OSC do with the information that you supplied regarding Officer Wilson?

Mr. **Hipple**. I feel they did nothing with my information. I felt many times that it was fed to Mr. Wilson. I felt that anything I was telling them—that is why I stopped giving the information after a certain point—anything I gave them it seemed like it disappeared, not worked on but being used to cover up Wilson's misdeeds in office. I determined from various officers that I still knew there that Wilson had information that should have been privy between me and the OSC.

Senator **Pryor**. Mr. Hipple, just for a moment let's talk about one other whistleblower who was involved in this incident. I believe this whistleblower is named Mr. John Berter. Was he an officer with you?

Mr. **Hipple**. I was a supervisor. He was one of the officers.

Senator **Pryor**. Was he a good officer?

Mr. **Hipple**. He was a very good officer. I have seen many officers. Being in Cincinnati all those years, I worked with thousands of different men, and I would rate Berter at least above average, equivalent to many officers I had worked with when I was on the Cincinnati Department.

Senator **Pryor**. Mr. Berter also has testified, as I understand it, basically corroborating your statement relative to the beating, is this correct?

Mr. **Hipple**. That is correct.

Senator **Pryor**. What has happened to Mr. Berter?

Mr. **Hipple**. Mr. Berter received the same treatment I had. He was sorted out. Effectively, the Chief started finding minor flaws in his report taking and constantly called him on it and wrote him up with a letter of admonishments. Wilson finally built a file on him for minor flaws, and then continued to harass him until he finally fired him.

Senator **Pryor**. What was Officer Berter's relationship with the VA up until the time of the Wilson incident?

Mr. **Hipple**. Until Wilson came on post there, Officer Berter's job was above average in every way. I have known him for the 4 years that I was there at that point in time, although he did not work for me. I have observed his report writing, I have seen him on investigations, and he was far above average.

Senator **Pryor**. Now, Mr. Hipple—and this is the last series of questions and then I am going to turn the hearing over to Senator Levin for a few moments—you have provided our Subcommittee staff with a copy of a tape recorder. I must say, this is fairly unusual. You had a tape recording, evidently on your person, and you recorded two discussions you had with an FBI agent investigating your allegations of abuse.

I am going to read part of this transcript to you:

> "Hipple: Did you get into it with 5 or 6 people to substantiate that they were beaten?
>
> FBI Agent: That is what I found out. I see these things and that is why this country is going down the tubes, because half the time you've got a witness saying he has been beat up. You have got other witnesses say they saw it. It is still not enough.
>
> Hipple: Did you get people to admit that they were beaten? That these things had actually happened?
>
> FBI. I've got 10 people I have interviewed, 10 that I call victims, 10 victims, you know, which is pretty substantial, in my opinion.

Senator **Pryor**. That is the end of this portion of the interview.

You talked to the FBI a good deal. Did they make any other statements to you on the strength of this particular case or this incident?

Mr. **Hipple**. Other than Mr. McDaniels, who was quite emphatic about the trial. He thought he had a very good case and he had worked very hard. I believe the man was very sincere and dedicated. He did find 10 victims, from what he told me on several occasions. He thought it was a prosecutable case and he wanted the Justice Department—he was waiting anxiously for them to tell him to go ahead. He felt he should go ahead on his own because he knew that there were more victims out there.

Senator **Pryor**. Did you know what the Special Counsel's office did with or thought of the information from the FBI investigation? Did they use the FBI findings? Do you know?

Mr. **Hipple**. To my knowledge, they have never acknowledged that the FBI found anything, but in my conversation with the FBI agent in that same tape he acknowledges that he does have evidence and he is looking for prosecution.

At a point in time that tape, Senator, is important only in this way—I felt under so much duress and under such a threat from Chief Wilson while I was still working there and after a point even with the OSC that I purchased the tape recorder and purposefully carried it because I wanted to record what was said, because I found everything was being turned around. Everything said and done was being turned around. Both by the chief and OSC investigators.

It became a habit with me to turn that machine on with whoever I had contact with in regards to this matter.

Senator PRYOR. Mr. Hipple, this is my last question. I have requested and, surprisingly, have received the Federal Bureau of Investigation file from your case. Evidently the Department of Justice and all the officials involved in this, including Officer Wilson, did not take this issue lightly. I have here a 600-page report by the Federal Bureau of Investigation on your particular case.

My staff has researched this case. They have found nothing to exonerate Officer Wilson. Why do you think that the Department of Justice, under the present statutes that we have, under the present obligations of a Federal employee, why has the Department of Justice refused to prosecute Officer Wilson?

Mr. HIPPLE. I can only speculate on that. Like I say, after a point in time I became very disenchanted with investigations being conducted by OSC and by anyone. In fact, I was getting to the FBI for a point of time. I became suspicious of what was happening there. Certain statements that I had said to them had gotten back to Wilson and his associates. I have no way of knowing how these statements did get back to Mr. Wilson, but I believe that somebody—and I do not know who—but somebody was talking to the VA people.

Wilson said that he had people in influential places. He mentioned Mr. Fazone being his mentor in Washington, the Chief of the VA Police Service, and he mentioned the FBI agent, Mr. Daly. I have no way of knowing if he ever knew the man, but he stated that he knew Mr. Daly. Daly was in charge of the Civil Rights Division of the FBI that handled the investigation later for us.

I have no way of knowing why if the investigation failed to bring about prosecution by the Justice Department. I do know that originally 75 pages were sent to them. Very conclusive evidence was in those 75, and you now possess 600 pages. I am very pleased at that, that they have substantiated what we have said. We have criminal charges here that were witnessed by more than myself and the other three officers. There are other officers, but the OSC has never contacted these officers for any type of information. There are people out there who are willing to talk, and they still work at the VA but they are afraid to come forward, as I was. That is why we sent the letter in November 1985.

Senator PRYOR. Mr. Hipple, I want to thank you on behalf of thousands of Federal employees for coming forward this morning. I know they appreciate your courage, your perseverance and your commitment to this particular case.

I will be returning in about 15 minutes. I will turn the hearing over at this time to my friend, Senator Levin.

Thank you, Mr. Hipple.

Senator LEVIN [presiding]. I am going to ask questions first of you, Mr. Hipple, and then we will go to Mr. Whitson. As I understand the chronology here, you were working at the VA prior to the time that Wilson got there. Is that true?

Mr. **HIPPLE**. Yes, sir. I was there in 1981 and he came in 1985.

Senator **LEVIN**. After he got there and after you blew the whistle on his activities as you saw them, there were certain allegations that he made against you which you felt were in retaliation for your blowing the whistle on him, is that accurate?

Mr. **HIPPLE**. That is accurate. There were certain statements he made against me and certain charges he levied against me that I knew were untrue and unfounded.

Senator **LEVIN**. And those charges included stealing food from the VA kitchen, as I understand it. Did he charge you with that?

Mr. **HIPPLE**. He charged me with taking a food tray on one occasion, yes.

Senator **LEVIN**. He charged you with failing to respond to an alarm. He charged you with falsifying journals. Were any of those charges true?

Mr. **HIPPLE**. No. They were all proven, with my rebuttal evidence, as being unsubstantiated. I felt at that time, Senator, that Wilson just felt that I would resign it he offered to let me resign—I think he felt that I would just resign that night when he accused me. He thought it was that simple, that I would resign and leave, knowing that I am a very proud person and not want to face these charges and embarassment.

When I did not and I fought him, he could not produce the evidence to prove any of these charges. In fact, I disproved them. That is why they did settle with me on my terms, and like I say, I am well pleased.

Senator **LEVIN**. When you did not resign, as I understand it, he discharged you.

Mr. **HIPPLE**. After a hearing with the directors of the hospital. They went along with his thinking. They totally disregarded my rebuttal evidence and went along with his thinking and my dismissal was ordered by them.

Senator **LEVIN**. All right. So you were dismissed at that point?

Mr. **HIPPLE**. They sustained, supported his charges, and then I appealed to the Merit Systems Protection Board later.

Senator **LEVIN**. So you appealed your dismissal?

Mr. **HIPPLE**. Yes, sir.

Senator **LEVIN**. All right. Prior to the time that Wilson got there, were there any charges made against you that appeared in your file?

Mr. **HIPPLE**. Prior to that, I had a superior rating for the last 35 years and I had documentation to prove it. I have, from the VA Hospital, those 4 years there, I had superior ratings. I even received a bonus in the year prior to Mr. Wilson coming there for superior performance. My ratings were always in the high numbers.

Senator **LEVIN**. There were no allegations of misconduct against you prior to the time that Wilson got there?

Mr. **HIPPLE**. Absolutely none. That includes also the Cincinnati Police Department, 28 years prior to the VA.

Senator **Levin**. You gave the name of an FBI agent, I believe, who talked to the 10 alleged victims of Wilson. What was the name of that agent?

Mr. **Hipple**. Mr. McDaniels.

Senator **Levin**. McDaniels. Now, why did you not go to the OSC? Why did you go to the Merit Systems Protection Board first? Do you remember your reasoning on that?

Mr. **Hipple**. I did after. I went to the FBI. We marched into the FBI office one day after they would not return four calls from my attorney. I did not know about OSC until June or July.

Senator **Levin**. But ultimately you made an appeal——

Mr. **Hipple**. Yes, sir.

Senator **Levin** [continuing.] On the basis of retaliation to the Merit Systems Protection Board. I am just curious, because we are trying to strengthen the OSC's statute. Why did you not go to the Office of Special Counsel yourself? Berter went there, for instance, but you did not.

Mr. **Hipple**. He went in May. I was not aware until after Berter went that there even was an organization to help whistleblowers.

Senator **Levin**. You went to the Merit Systems Protection Board, as I understand it, filed your appeal of your dismissal, and you settled before the hearing at the MSPB, is that correct?

Mr. **Hipple**. Yes, just a few days before.

Senator **Levin**. Did the VA give you any reasons for settling with you? Did they specifically, explicitly tell you why it was they were settling?

Mr. **Hipple**. No. The agreement does not state that.

Senator **Levin**. Did they orally tell you?

Mr. **Hipple**. Orally, they did not say anything beyond what was in the original agreement. I retained—I should not say that because that is part of the agreement.

Senator **Levin**. All right.

Mr. **Hipple**. I was satisfied with the agreement. The only thing I do not have is my job back, and I did not want that as long as Wilson was still there.

Senator **Levin**. All right. Is it fair to say there was a monetary settlement of some kind?

Mr. **Hipple**. Monetary and fringe benefits.

Senator **Levin**. All right, without getting into the amount of those benefits, because that is apparently between you and the other side.

Now, you say that when the Office of Special Counsel interviewed you relative to those other complaints that they did not take even an unsworn statement from you, is that correct?

Mr. **Hipple**. None. Nothing on tape, nothing written. They might have been making minor notes on a sheet of paper, but beyond that, no.

Senator **Levin**. When they heard your story—this was prior to the settlement—did they offer to assist you?

Mr. **Hipple**. They assisted us only in one way. They asked me to send a complete file of everything I had given in my rebuttal and every piece of evidence they had submitted against me. I sent this to them. Beyond that I heard nothing.

Senator Levin. Did they offer to assist you personally? They were looking into Berter's case, and the other person's case. Did they also say, we will look into your case for you and assist you?

Mr. Hipple. Up to that time, sir, they had not looked into Berter's case.

Senator Levin. No, but when they talked to you at that point, did they make an offer to assist you at that time, other than what you have told us?

Mr. Hipple. Well, a few telephone conversations prior to the settlement, yes.

Senator Levin. Was that relative to the other cases, or was that because they were willing to take on your case? Did they even indicate a willingness to take on your case?

Mr. Hipple. Yes, sir, they did, agree to take on my case.

Senator Levin. The OSC did?

Mr. Hipple. They said that they would look into the matter, and they did come in in September, which was too late for me.

Senator Levin. That was September of 1986?

Mr. Hipple. 1985.

Senator Levin. 1985.

Mr. Hipple. I am sorry. 1986.

Senator Levin. 1986. When was Berter's claim filed; do you remember?

Mr. Hipple. Approximately May 25.

Senator Levin. So it is a little over a year now that Mr. Berter's case has been pending at the OSC?

Mr. Hipple. Yes, sir.

Senator Levin. Do you know whether they have resolved that case?

Mr. Hipple. They have not.

Senator Levin. So that the chronology is very clear, the first time that your troubles began with Wilson was after you tried to stop what you saw as brutal treatment of VA patients, is that correct?

Mr. Hipple. Up to that time I had been promoted to supervisor. Not that Mr. Wilson had any control over that. I had taken the competitive examination and topped the list. Up to that time I was an advisory to Mr. Wilson on police-related matters as far as the shift work that I did.

Senator Levin. All right. So your troubles with Wilson began only after you complained about what you saw as brutality to VA patients.

Mr. Hipple. Not at that moment but right after the letter was written just after Wilson became aware in January.

Senator Levin. Only after that?

Mr. Hipple. After November when the letter was written.

Senator Levin. How soon after was it, do you remember?

Mr. Hipple. It started on January 14, 1986. Just after Wilson learned of the November letter.

Senator Levin. Okay. That was about a couple of months after, then?

Mr. Hipple. Yes.

Senator Levin. Now, you said that the Office of Special Counsel advised somebody to resign. Who was it they advised to resign?

Mr. HIPPLE. They advised the man I call Officer A. He was a police officer. He formerly was a friend of Mr. Wilson's, a close friend that he had brought in there and hired. They had a falling out, Mr. Wilson and Officer A had a falling out and at this time Mr. Wilson started harassing him and telling him he would not give him emergency leave. He told him just to resign.

Senator LEVIN. Who told him to resign?

Mr. HIPPLE. Mr. Wilson.

Senator LEVIN. I thought you said that the Office of Special Counsel advised somebody to resign?

Mr. HIPPLE. The Office of Special Counsel did, when he took the answering machine tape recording and the note that Mr. Wilson had left him there threatening him to pay up the money he owed him, and he must be in the office Monday morning first thing to resign. He took that to Vince Russell, who was in town from the OSC at that time.

Russell just happened to be in town in Cincinnati. I knew it and I told Officer A to contact him. He took that evidence to him. It was given to Mr. Russell. To this date I do not know what happened to that evidence.

Senator LEVIN. Now, just to make sure I get these people straight. You have not given us the name of that person, have you?

Mr. HIPPLE. No, sir.

Senator LEVIN. Okay. Did that person resign?

Mr. HIPPLE. To my knowledge, from a colleague who is still working there who was the one that sought my advice on how to help Officer A, my understanding is that Officer A told him after he resigned that he was advised by Mr. Russell and the OSC to go in and resign; do not fight it, go in and resign and we will take care of you.

Senator LEVIN. But did Officer A resign?

Mr. HIPPLE. He did resign. To my knowledge, he did resign and left post. He has not been seen since.

Senator LEVIN. He resigned following the advice from the Office of Special Counsel.

Mr. HIPPLE. That same day, I understand.

Senator LEVIN. Does our Subcommittee staff have the name of that officer?

Mr. HIPPLE. Yes, they do.

Senator LEVIN. So we know who that officer is?

Mr. HIPPLE. Yes, sir, you do.

Senator LEVIN. Has that officer filed a complaint with the OSC?

Mr. HIPPLE. No, sir. He has not been contacted or heard from since.

Senator LEVIN. Did he initiate a complaint with the OSC? Did he not go in and say, okay——

Mr. HIPPLE. He did initiate a complaint by talking to Vince Russell. Vince Russell verified to me in the telephone conversation he talked to him for several hours.

Senator LEVIN. Do you know whether there is a case pending by that man?

Mr. HIPPLE. I have no idea, sir.

Senator LEVIN. All right. Would you blow the whistle again if you were in the same position?

Mr. **Hipple**. Since I can now look back in retrospect, how much this has cost me in time, in money, at 58 years old I am seeking a new livelihood, and it is very difficult, sir. It is very difficult at 58 to find desirable work. I would have to think long and hard before I would. I probably would flow along with the tide and maybe not become part of it. I certainly would not become part of the brutality, but I certainly would not put myself in that position again. Especially since no one in Government has helped us.

I say that because I know what it has done to my personal life in so many ways. The grief and torment that it has given me for many months now. I would think twice about it, certainly.

Senator **Levin**. Just one last question. Are you in touch with Mr. Berter?

Mr. **Hipple**. Often.

Senator **Levin**. Do you know the last time that the OSC talked to him or gave him a status report on his case?

Mr. **Hipple**. He hasn't mentioned that in several months—3, 4 or 5 months.

Senator **Levin**. Thank you very much, Mr. Hipple.

We will now call on Mr. Whitson. You are free either to stay, Mr. Hipple, with your attorney, or you can leave; either way, whatever you would like.

Mr. Whitson, we welcome you.

Mr. **Whitson**. Thank you for allowing me to comment on the issue of providing greater protections to those who expose fraud, waste and abuse in the Government. Since my written statement is rather lengthy, with your permission I will summarize it for the record and submit the full text for inclusion in the record.

My name is Joseph Whitson, Jr. I am formerly a supervisory chemist and the chief of quality control at the Air Force Drug Testing Laboratory at Brooks Air Force Base, Texas. I was hired for that job on the basis of my qualifications only. I was never interviewed. I received superior ratings throughout my tenure until I was ordered to testify about my duties in a military court martial proceeding.

Within a hour of leaving the witness stand I was relieved and detailed to a make-work job in the basement of another building. My duties consisted of dusting file cabinets, checking refrigerators, and sweeping the floor.

In January 1984, I had brought a list of problems which could not be internally corrected to my supervisor. His reaction was to order me to classify the document substantiating these problems so that they would not be subject to discovery by attorneys. In April, I was given a direct order by the same supervisor to talk with these attorneys. The next day I was given a letter of counseling because I talked to them, as ordered.

Then, in late May, a court martial was moved from Patrick Air Force Base to Brooks Air Force Base for the convenience of the Lab and its personnel. The Lab was testing urine for drugs for the entire Continental Air Force and the Army in a six-State region.

Let me emphasize that I am not against drug testing. I am strongly against shoddy testing practices and political use of drug testing to brand persons as dope addicts or abusers who may be innocent.

This issue was the subject of much abuse. We were given a list of Social Security numbers that were always to be reported clean no matter what was in them. There were at least two such lists that I knew of. I did not copy them since the agency would then charge me with a violation of the Privacy Act. I also received phone calls from UNM commanders asking me to "find" drugs in samples, so individuals could be "gotten rid of" quickly.

Again, I would like to emphasize that I did not make disclosures openly or covertly to the press.

When I completed testimony, the Judge told me to go to lunch and then return to duty. Upon my return, I was stopped from reentering my work area and called to the Chief of the Lab's office and relieved and detailed. I was then escorted into my work area, made to clean out my desk with all my former employees and other potential witnesses in the court martial looking on.

Then I was taken to another area of the base for my detail. In due time I contacted the OSC and made a complaint. Also, during this time I was made aware that my phone was being monitored both at work and at home. My tires were flattened on one occasion, and my battery cables were cut while my car was parked on base.

I was threatened with my job the day before I received orders to testify in three other court martial cases. The agency made good on the last threat when I pointed out to the attorneys that the Lab had sent erroneous information and showed them how to read the particular information and how it was in error.

The OSC, or the Other Side's Counsel, took the information I had provided them and returned it to the agency to assist the agency in building a case against me for document violations. The problem was, all my documentation was public record or obtained through discovery. After speaking with five different persons, each of whom identified themselves as an assigned investigator in my case at different times, I came to Washington to try to get a picture of what was really going on.

I met Vincent Russell, since my current investigator, Pat Stone broke our appointment and he told me they were so overworked and understaffed they would get to me if and when they could. Two weeks later I got a letter dismissing my case.

I have received calls from former co-workers, many in tears, apologizing about their lack of courage in not coming forward and attesting to the validity of my disclosures. But they have seen what the agency has done. They have seen what the agency has gotten away with, and they dare not risk the reprisals themselves. That is why we need this legislation.

As long as the Office of Special Counsel is allowed to enforce the law at their whim, there is no protection for those who expose the abuses of power which take place.

How many innocent persons must be forever branded as drug abusers based on questionable testing results? As deficits rise and budgets decline, can we afford to have fraud, waste and abuse in Government? Can we afford an agency like OSC that is dedicated to doing all within its power to eviscerate the whistleblower?

There are hundreds of whistleblowers from the millions of public and private sector employees. Who will protect your rights when they have all been destroyed?

Thank you.

Senator LEVIN. Thank you very much, Mr. Whitson.

You indicated that you were assigned to five different investigators of the Office of Special Counsel. Would you go through that chronology for us?

Mr. WHITSON. Yes, sir. Originally I received a letter signed by Ms. Ellen Oskue assigning Mr. Jeffrey Covert. Let me think. The next one, was Mr. Stanley Verusio. I was told he had left the Office of Special Counsel.

Then it was given to Pat Stone.

Senator LEVIN. Well, without going into the names.

Mr. WHITSON. Okay.

Senator LEVIN. You were assigned to an investigator by letter?

Mr. WHITSON. Yes, sir.

Senator LEVIN. We will call that investigator number 1. Did you ever talk personally to that investigator?

Mr. WHITSON. On one occasion.

Senator LEVIN. All right. What happened to that investigator?

Mr. WHITSON. Nothing happened until I called. This happened in October. There was inactivity on the part of OSC until December, and then in late December of 1984 or early January timeframe of 1985 I called the Washington office and was told that the case had been transferred to Dallas.

Senator LEVIN. So you had to make that call?

Mr. WHITSON. Yes, sir. They never called me.

Senator LEVIN. And this was January of 1986?

Mr. WHITSON. January of 1985, sir.

Senator LEVIN. Of 1985?

Mr. WHITSON. Yes, sir.

Senator LEVIN. So then you called Washington and they said the case had been assigned to Dallas?

Mr. WHITSON. Yes, sir.

Senator LEVIN. Now, were you contacted by the Dallas office?

Mr. WHITSON. No, sir. I contacted them and two days later my call was returned by investigator number 2, who I have not named.

Senator LEVIN. Okay. So investigator number 2 got back to you after you initiated the call.

Mr. WHITSON. Yes, sir.

Senator LEVIN. Then what happened?

Mr. WHITSON. On three different occasions he said, get the witnesses together, I want to come down and interview them. Each time I got the witnesses together and nothing happened. He never showed up.

Senator LEVIN. Did you send them the witness list?

Mr. WHITSON. Yes, sir. I sent them a witness list as well as a brief description of what their testimony or disclosure might be.

Senator LEVIN. This is all with investigator number 2?

Mr. WHITSON. Yes, sir.

Senator LEVIN. Did that investigator call you three times or did you call him or her three times?

Mr. WHITSON. I called him the first time and pressed him for a date. I was given a date.

Senator LEVIN. A date for him to show up?

Mr. **Whitson**. A date for him to come down to San Antonio from Dallas and interview witnesses.

Senator **Levin**. Now, did he show up?

Mr. **Whitson**. No, sir.

Senator **Levin**. Did he call you in advance to tell you he was not going to show up?

Mr. **Whitson**. No sir.

Senator **Levin**. What happened after he did not show up?

Mr. **Whitson**. When he did not show up, I had the witnesses meet me at my house and we discussed things. And then, of course, they went home. The next day I called him at his office and was unable to reach him. He returned my call a day or two later. I do not remember the exact day.

Senator **Levin**. Okay. Did he give you an explanation for not showing up?

Mr. **Whitson**. He just said something had come up.

Senator **Levin**. But he never called you in advance or even afterwards. You had to initiate the call, is that right?

Mr. **Whitson**. No, sir. He never called me.

Senator **Levin**. All right. And then he said, something came up and that—what? That he would come down another time?

Mr. **Whitson**. He made a second appointment.

Senator **Levin**. Okay. Appointment number 2, did he show up then?

Mr. **Whitson**. No, sir.

Senator **Levin**. Were your witnesses gathered together again?

Mr. **Whitson**. Yes, sir, once again. And at that time one of them made a remark about the Special Counsel, that it did not look like they were going to be much help.

Senator **Levin**. Did he call you in advance of not showing up the second time?

Mr. **Whitson**. No, sir.

Senator **Levin**. Did he call you afterwards?

Mr. **Whitson**. No, sir. I called him again the next business day and was able to talk to him and he said that he had been detained and was not able to come to San Antonio.

Senator **Levin**. Do you remember the name of that investigator?

Mr. **Whitson**. Yes, sir.

Senator **Levin**. Who was that?

Mr. **Whitson**. Rodney Williams.

Senator **Levin**. Okay. Now, did he set up a third date with you?

Mr. **Whitson**. Yes, sir.

Senator **Levin**. Did he show up the third time?

Mr. **Whitson**. No, sir. That was in February. Two appointments were in January 2 weeks apart, and one in February.

Senator **Levin**. Are we still talking 1986?

Mr. **Whitson**. 1985.

Senator **Levin**. I will get it straight. We are still talking 1985.

Mr. **Whitson**. Yes, sir.

Senator **Levin**. So in February of 1985, you had the third appointment with Mr. Williams. He did not show up.

Mr. **Whitson**. Yes, sir.

Senator **Levin**. Did he call you in advance to tell you?

Mr. **Whitson**. The same pattern. I called him the next day, again. This time he had a different story, though. He said that my case was so politically sensitive that it was being sent back to Washington.

Senator **Levin**. Did he tell you what he meant by politically sensitive?

Mr. **Whitson**. No, sir. He just said I would have to contact them for details.

Senator **Levin**. Contact whom?

Mr. **Whitson**. He said I would have to contact the OSC office in Washington for details.

Senator **Levin**. Did he give you the name of the place to contact?

Mr. **Whitson**. He told me the Office of Special Counsel and he gave me their 1-800 number.

Senator **Levin**. Okay. Did you call them?

Mr. **Whitson**. Yes, sir.

Senator **Levin**. Then what happened?

Mr. **Whitson**. I found out that a third investigator had been assigned and I was able to talk to him.

Senator **Levin**. What was his name, or do you remember.

Mr. **Whitson**. That was Mr. Stanley Verusio.

Senator **Levin**. That is all right. Investigator number 3.

Mr. **Whitson**. Yes, sir.

Senator **Levin**. What was the conversation with him?

Mr. **Whitson**. He actually seemed to want to help. I sent him a witness list. I sent him all of my documentation. I mailed approximately 22 pounds of documents to him, by weight. I understand from two of my witnesses that are in other States, he called them to set up appointments with them and took one statement, at least partial statement, by telephone and requested a second one to go down to the FBI and make an affidavit of their conversations addressing certain issues.

But he never came down and interviewed any of my witnesses that were in the San Antonio area. He called me in April of 1985 and told me that he was being pulled off my case and reassigned, and he introduced me over the phone to investigator number 4.

Senator **Levin**. He was being reassigned?

Mr. **Whitson**. Yes, sir.

Senator **Levin**. Or the case was being reassigned?

Mr. **Whitson**. I believe both. He said that he was leaving the office and the case was being reassigned.

Senator **Levin**. What was the name of investigator number 4; do you remember?

Mr. **Whitson**. Number 4 was Pat Stone, a female.

Senator **Levin**. Ms. Stone. Okay. What did she tell you?

Mr. **Whitson**. She was not familiar with my case, had not had a chance to read the documents, but she would get with it but I needed to send her yet another summary, and I had sent summaries to Mr. Williams, to Mr. Verusio, and also my initial complaint, which was well over an inch thick.

Senator **Levin**. All right. Did you send her the summary?

Mr. **Whitson**. Yes, sir.

Senator **Levin**. Then did you hear from her?

Mr. Whitson. I sent her the summary. I called after a week to confirm that the documents had indeed been received. She said that they had, she had not had a chance to look at them but she would get back with me.

She called my home about 2 weeks later and left a message for me to call her, which I did, and she told me she was going to come down and talk to witnesses. This was in April of 1985.

Hers was the same pattern of Mr. Williams. She made two appointments and did not come either time. The last time when I tried to get my witnesses together they told me that it was too risky for them to make any sort of statements.

Senator Levin. Did you bring the witnesses together the first time for her?

Mr. Whitson. Yes, sir.

Senator Levin. And she did not show up?

Mr. Whitson. No, sir.

Senator Levin. She did not give you any explanation?

Mr. Whitson. No, sir. She called the next day and said that she had been unavoidably detained, that my case had been put on the back burner, to quote her.

Senator Levin. The back burner to burn up. But at she called you that day, right?

Mr. Whitson. Yes, sir.

Senator Levin. She said, though, that she was going to come down another time?

Mr. Whitson. Yes, sir.

Senator Levin. Another time was scheduled?

Mr. Whitson. Yes, sir.

Senator Levin. The second time with her, though, you could not even get your witnesses together. They were pretty well worn out by now?

Mr. Whitson. Well, it did not really matter. What they told me was, if she showed up, to give them a call and they would come over. [Laughter.]

Senator Levin. Did you ever get an explanation of the political influence issue?

Mr. Whitson. No, sir.

Senator Levin. Other than that one comment?

Mr. Whitson. That was the only comment, sir.

Senator Levin. Now, when she did not show up the second time, what did you do?

Mr. Whitson. It was interesting because she not only did not show up, she had sent some documents by express mail for use in another case to the Mariott Hotel in San Antonio and she asked me to go down and pick them up and mail them back to her at her address, her home address in Silver Spring, Maryland.

But at least I knew in advance not to call people to come over.

Senator Levin. When she did not show up the second time, then what? Did she call you?

Mr. Whitson. She had called me to tell me to return the documents and she said, I will set up an appointment sometime in the future.

Senator Levin. She said she would set up an appointment sometime in the future. Then what happened?

Mr. WHITSON. Well, then I waited and after about 6 weeks I called back and she was on some other assignment and could not be contacted, so I left a message. She did eventually return my call and I told her that I was going to come to Washington and I wanted to meet with her to see what documentation she had and discuss her progress on my case, and gave her the dates that I would be in D.C. and asked her for a primary appointment time and a secondary appointment, in case either one of us ran into scheduling conflicts.

Senator LEVIN. She did not tell you to bring all of those witnesses with you, did she?

Mr. WHITSON. No, sir.

Senator LEVIN. Did you go to D.C.?

Mr. WHITSON. Yes, sir. I came up here in, I believe it was August of 1985.

Senator LEVIN. Then what happened?

Mr. WHITSON. I called her to reconfirm the appointment when I arrived in the area and it was reconfirmed so I went to the Office of Special Counsel. I found it, went up there, and was told that she was out for the day and she would not be in. That was around 2 o'clock in the afternoon and I said, well, I want to see somebody, if I cannot see her surely she has a supervisor, and I do not want to leave until I have talked to somebody about this because I have come a long way.

They left me sitting there for about an hour and then they showed me into Mr. Vincent Russell's office and he told me about how underworked—Freudian slip there—overworked and understaffed and overburdened their agency was, that there were so many whistleblowers out there and they would get to me when they got a chance to.

Senator LEVIN. And that was it?

Mr. WHITSON. That was it for that meeting.

Senator LEVIN. Did you then go back to San Antonio?

Mr. WHITSON. Yes, sir.

Senator LEVIN. Then what happened?

Mr. WHITSON. Two weeks later I got a letter saying that my case had been cancelled.

Senator LEVIN. And that was it?

Mr. WHITSON. Yes, sir.

Senator LEVIN. So after setting up all of these meetings with you and never showing, after getting you to travel to Washington on a confirmed meeting and showing up late, suddenly 2 weeks later, after all this runaround, after gathering witnesses together all of those times with the OSC failing to show up, without any explanation, you just simply get a letter saying that your case was dismissed and that is it?

Mr. WHITSON. Yes, sir. I was told that the case was dismissed, and then I called the office to see why specifically, because during this meeting Ms. Stone, who was supposedly out for the rest of the day came in and said she could not show me the documents they had but she would like me to send other documentation. So I got the documentation together that I thought she might need, sent it up to her, and I express mailed the documents to her on the same day that the letter arrived dismissing my case.

I was told that the decision to dismiss had been made by Mr. Fong in legal. I tried to contact Mr. Fong and he would not take my calls initially. When I finally did get a chance to speak with him, he said that "the matter is closed and we cannot be bothered with it anymore."

Senator LEVIN. Did you meet with Ms. Stone the same day you say that your case was dismissed?

Mr. WHITSON. No, sir. Not the same day. The day that I met with Mr. Russell, she came in at the very end of the meeting and said, we really need more documentation.

Senator LEVIN. Okay. I know you said something had happened the same day that your case was dismissed?

Mr. WHITSON. Yes, sir. That was the day that I sent the documents that she requested.

Senator LEVIN. I see. So the day you sent the documents she requested was the day you got the letter saying your case was dismissed?

Mr. WHITSON. Yes, sir.

Senator LEVIN. Mr. Chairman, what we have heard in the last 10 minutes is absolutely incomprehensible action on the part of the OSC.

If Mr. Whitson's story is correct, and we have no reason not to believe it, we have got an agency which is supposed to be protecting him, but which is instead offending and insulting him just on a pure process basis, putting aside whether or not Mr. Whitson is right or wrong on the substance of the merits. Whether or not the action taken against him was because of his insistence on telling the truth as he saw it at a court martial or hearing is a different issue, and I am not sure we can judge that. We are not sitting here as the Merit Systems Protection Board or as the OSC.

But what we are interested in—at least in part, and I know you are interested, Mr. Chairman, and our bill seeks to address this issue—is the OSC itself. I would hope that between now and the time the OSC comes here that we would ask them to be prepared to comment on the chronology that Mr. Whitson has just described.

Meeting after meeting after meeting after meeting—and I have not finished, there were at least five of them—where he was asked to gather together witnesses so that an OSC representative could come and interview them, and then the OSC does not even show up. Without any explanation, they simply do not show up. Now, we want to hear their side of it, obviously, but I do not think—of course, this is not a subcommittee upon which I serve, so it would be up to the Chair, and forgive me if I am being presumptuous—but I myself would not be satisfied by the OSC simply saying that they are not willing to comment on the merits of this case and that they do not comment on the merits of individual cases.

I would like to hear from the OSC the specific reasons or their explanation of why they put this citizen through the turmoil and travail of not showing up for at least 5 meetings that they set up. If that proves to be the case—and we have no reason to doubt it from Mr. Whitson's testimony, but we obviously want to hear from the OSC—we have got an agency here which just simply does not care what they do to the people that they are supposed to be helping.

So I would hope, Mr. Chairman, that between now and the OSC visit to us—I think at the next hearing the OSC will be present—that our staff could go over with the OSC the precise chronology that Mr. Whitson has given to us of all of those meetings which were scheduled where the OSC just simply decided not to show up.

This kind of a run around is inexcusable. Obviously, we cannot judge the merits of all of these cases, but what we can do is judge the way in which the OSC approaches cases, and that, I hope, we will press the OSC on at the next hearing.

Thank you, Mr. Chairman.

Senator **Pryor**. Senator Levin, I want to thank you for chairing the hearing during my absence. I have a couple of questions for Mr. Whitson.

Could you outline—and you may have covered this, Senator Levin—could you outline, Mr. Whitson, the reprisals that were taken against you after you testified in the court case?

Mr. **Whitson**. First of all, I was relieved from my job and put into a make-work job.

Senator **Pryor**. How soon after your testimony were you relieved from your job?

Mr. **Whitson**. Within 1 hour.

Senator **Pryor**. Within what?

Mr. **Whitson**. Within 1 hour.

Senator **Pryor**. One hour?

Mr. **Whitson**. Yes, sir.

Senator **Pryor**. Were you subpoenaed to testify in the case?

Mr. **Whitson**. Yes, sir, I was.

Senator **Pryor**. This was a court martial matter, as I recall?

Mr. **Whitson**. Yes, sir, it was.

Senator **Pryor**. Thank you, proceed.

Mr. **Whitson**. I was subpoenaed. I asked the Judge if he could protect me and he said that he thought that he could, pursuant to the principle that testimony that you give, if it is truthful, you will not be retaliated against. There is a legal term for that but I do not know what it is.

He found out and commented on the record that he was sad to say that he could not protect witnesses.

Senator **Pryor**. All right. So 1 hour after you testified in the court martial case, you were relieved or transferred?

Mr. **Whitson**. I was relieved. Their term was "relieved and detailed." I was relieved from my duties and I was detailed to a make-work job in the basement of another building.

Senator **Pryor**. You were in the basement of the same building, right?

Mr. **Whitson**. No, sir, on another part of the Base.

Senator **Pryor**. I see.

Mr. **Whitson**. I was forbidden to go—on the books I was still in charge, but I was forbidden to go into my work area, or even to enter that building.

Senator **Pryor**. It seems like I recall another recent military case like that which is getting a lot of news right now, Ollie North.

Mr. **Whitson**. Yes. We are supposed to manage in absentia.

Senator **Pryor**. Mr. Whitson, go ahead. I did not want to interrupt.

Mr. WHITSON. That is all. Oh, the other reprisals?

Senator PRYOR. Yes.

Mr. WHITSON. I got threatening phone calls. My phone was monitored, and I know this because of comments——

Senator PRYOR. How do you know it was monitored?

Mr. WHITSON [continuing]. Comments made by people that I had never met that came up. My wife called me one day. She was rather agitated about some mail that we had gotten, and about 10 minutes later a senior NCO came by and said, sorry to hear you are having problems at home, and I had never met him in my life. I only knew his name by his name tag.

Senator PRYOR. Was it later admitted by the Government that your phone was monitored?

Mr. WHITSON. No, sir. They have never admitted to anything, nor have they admitted that there were any problems with the drug testing. They did, however, bring back 6,666 people on the basis of faulty drug tests.

Other things: my tires were flattened at one point. All the air was let out of all four tires, which is kind of frustrating. My battery cables were cut. My performance ratings were lowered. Documents disappeared from my OPF. That is about all.

The final blow, I guess, was the continuing calls that I would get. I could always tell when I was going to get orders to go to another court martial because I would get a phone call saying, "if you testify, it may cost you your job." The third time they made good on the threat.

Senator PRYOR. Mr. Whitson, to your knowledge, did the Office of Special Counsel conduct any investigation whatsoever into your allegations?

Mr. WHITSON. Not that I could prove, and I have documentation that can prove everything else that I have said.

Senator PRYOR. One final question. Did anything happen to the other expert witnesses called in the court martial case, this same case in which you were a witness?

Mr. WHITSON. Two witnesses were transferred immediately to Germany; two later were not allowed to reenlist into their same occupational specialties, forced to retrain into another area and transferred to Germany; the Judge in this case was transferred to Korea. I think that about covers it.

Senator PRYOR. Well, they took care of all of them.

Senator Grassley?

Senator GRASSLEY. The legislation that Senator Levin has introduced allows access to the courts and you have stated in your testimony that: "I have exhausted my administrative remedy."

We have opportunities going to court sometimes when the administrative remedy is not completed and then in another instance in which you have gone the route and lost that case there, you can go into the courts.

Do you feel that this legislative change would meet your needs?

Mr. WHITSON. If we are allowed to go into the courts locally. If we have to hock our houses and sell everything that we own to come to Washington to that District Court, no sir, it would not.

Senator GRASSLEY. Senator Levin, do we make them come to Washington under that legislation?

Senator **Levin**. I am just looking it up to recheck that. I do not have it here. We will have to check that out.

Senator **Grassley**. Okay.

Senator **Levin**. Probably, that is a requirement of all administrative appeals, but I am not sure. I think all administrative appeals do come to Washington.

Senator **Grassley**. Okay. But if you could do it at your local District Court, you would consider that a great improvement in the way of whistleblower protection?

Mr. **Whitson**. Yes, sir, because if I bring an appeal to Washington, of course, I have to get a local attorney that is licensed to practice in Washington; I have to transport all of my documentation and my witnesses at my expense and put them up at my expense. While the agency may have unlimited funds, I do not.

Senator **Grassley**. My staff just informed me that our legislation does provide for you to take your case to the Court in the District you live in.

On the 4th page of your testimony you refer to some people receiving special treatment in the drug testing program. Would you elaborate on that?

Mr. **Whitson**. There were at least two lists that I saw. One was actually given to me. We were told that these numbers, regardless of what we found in them, were never to come up positive. That is what I was referring to. Other times I received calls from Commanders asking me to "find" drugs in particular samples.

Senator **Pryor**. A final question, Mr. Whitson. Would you recommend to your colleagues, Federal employees, et cetera, that they become a whistleblower or just let things ride?

Mr. **Whitson**. Look the other way. I had the documentation of a court case in progress. I had a military Judge that documented the whole thing. He was appalled by what he saw, yet he could not help me. The OSC would not help me. The agency obstructed everything that I tried to do through the agency grievance procedure, and finally after keeping my grievances going on for over 600 days, when 45 days is the statutory limit, they summarily dismissed them after I had transferred to another agency.

Senator **Pryor**. We express deep gratitude to you today for your testimony and your willingness to pursue this case. I know I speak for thousands of Federal employees when I say that.

Mr. **Whitson**. Thank you, sir.

Senator **Pryor**. Thank you, Mr. Whitson, Mr. Hipple and Mr. Carpenter.

Let me state to our first panel one final observation, and that is, we are going to keep this record open for a few days and we may be submitting to each of you additional questions that we can put in the record.

We will call our next panel now. We hear from two more whistleblowers. We have Dr. Mary Brothers and Mr. Timothy Reid.

In 1980 Dr. Brothers and the Chief of Surgery at the Veterans' Administration Medical Center in Leavenworth, Kansas, blew the whistle on questionable activities at that Hospital. Dr. Brothers' story has an interesting twist. She recently won a large award in a jury trial against the Veterans' Administration. But she was able to do so only—and I emphasize only—because she at that time was not a full-time permanent Federal employee. The Chief of Surgery was a full-time permanent Government worker who went to the Office of Special Counsel for help and has received nothing.

It is a fascinating story, Dr. Brothers.

Our second witness is Mr. Timothy Reid from San Diego, California. Mr. Reid exposed waste in the U.S. Naval overhaul project and then found himself being investigated and transferred.

Again, we thank both of you for coming. You have come a long distance. Dr. Brothers, I wonder if you would begin your testimony.

TESTIMONY OF MARY E. BROTHERS, M.D., FORMER SURGEON, VETERANS' ADMINISTRATION HOSPITAL, LEAVENWORTH, KS; [1] AND LAWRENCE TIMOTHY REID, ENGINEER, U.S. NAVY, SAN DIEGO CA,[2] ACCOMPANIED BY JOHN K. SHIPOSKI [3]

Dr. Brothers. Mr. Chairman, members of the Subcommittee, and fellow whistleblowers, my name is Mary Brothers, and I am a general surgeon who currently practices occupational medicine in Kansas City, Missouri. My testimony today is meant to compliment my written statement.

In the summer of 1980 I was hired as a temporary part-time staff surgeon at the VA Center, Leavenworth, Kansas, where I had previously completed a 4-year residency in general surgery in 1979. Shortly after returning to the VA, I learned the Leavenworth administration was proposing to remove the Chief of Surgery, Dr. Mary McAnaw.

Urged on by an article on the IG which promoted use of the hotline, I wrote to the VA's IG seeking an investigation, and only then learned from Dr. McAnaw that she and a staff psychologist had been attempting to obtain a local investigation into a questionable drug research study being conducted by the chief of the psychiatry department.

The drug was Anafranil, an antidepressant. The psychologist and McAnaw felt local VA administration had commenced a coverup of this study and I agreed with them, after I had conducted my own investigation and a review of some patient records.

In the fall of 1980 I learned my confidential letter to the IG had been sent back to the Leavenworth Center Director for comment. The letter was poorly edited, containing three sentences which would identify the author.

In late 1980 I was offered a full-time position by Dr. McAnaw. On January 13, 1981, I accepted the job offer. However, on January 22, the Center Director and the Chief of Staff informed McAnaw they did not wish to hire me and were advertising for additional applicants.

In a January 29 meeting with the Center Director I was told that she preferred not to hire me, did not know, "what kind of career," I would have in the VA, and that she and the Chief of Staff were seeking to deal with what they considered to be administrative problems with McAnaw. She also informed me there were some who thought I had been involved in sending an "anonymous letter," to Central Office in defense of McAnaw.

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[1] See p. 186 for Dr. Brother's prepared statement.
[2] See p. 204 for Mr. Reid's prepared statement.
[2] See p. 209 for Mr. Shiposki's prepared statement.

In concluding, the director stated that if no additional surgeons could be located within the VA or through job ads, I would be the first one she would turn to after a 2-week grace period. The VA then proceeded to alter the hiring protocol which had been used to employ the previous five surgical staff physicians, arranged for a search committee which did not include a surgeon to screen applicants, and established an ad hoc applicant rating scale that would have given me a zero rating.

Following an investigation by the Medical IG, the Leavenworth VA temporarily changed the requirements for the staff surgeon job to read "Board Certified" instead of the more customary "Board Eligible or Certified."

In November of 1982, after still more job ads, VA hired a Board Certified general surgeon who had been on probation with the Kansas State Board of Healing Arts. He left after 1 year on the job.

Throughout late 1981 and 1982 the VA moved ahead with plans to force the removal of McAnaw, demoting her to staff surgeon, and leveling 10 charges of administrative incompetence against her. This is ironic when one considers that this is the same surgeon who was appointed to chair the Medical District Number 22's Chiefs of Surgery Committee by the Center Director on January 10, 1980, just weeks prior to the Anafranil allegations.

After obtaining legal counsel, McAnaw filed suit in the 10th Circuit Federal Court in June of 1981. An appeal by McAnaw to the Merit Systems Protection Board was denied on July 19, 1983. Meanwhile, I became active in soliciting the assistance of the Kansas Congressional delegation who ultimately forced a formal IG field audit. Results of multiple, "investigations," were disappointing, however, as most reports clearly were biased in favor of the VA and the final IG report bore little resemblance to the draft version with respect to the Anafranil study.

In July of 1981, our attorney first approached the Office of Special Counsel seeking assistance in the McAnaw case. This was the Kozinski era and between 1981 and late 1982 the inquiry went from Washington to Philadelphia and back and it was assigned to at least two investigators, one of whom was instructed not to deal with us, while the other was sent to Europe.

The agency also seemed unable to obtain the transcript of a 4110 disciplinary hearing held on the charges against McAnaw in April and May of 1982 in which she exhausted her appeal within the VA. Later, at the beginning of the O'Connor era in OSC, the investigator initially stated he had no idea when he might come to Leavenworth and then appeared with no warning while McAnaw was in Chicago attending the College of Surgeons conference. The 4110 Board sustained all 10 charges against McAnaw in its decision of September, 1982, ordering a demotion and transfer to Kansas City VA.

On April 15, 1982, I had also filed suit against the VA, alleging a Bivens tort under the First Amendment, and my case tended to be handled as correlative to the McAnaw case. The OSC treated both cases as a combined issue and we felt that if the McAnaw case could be won, either in the OSC or in the courts, then the Brothers case would follow. It also appeared as though I had no formal appeal right within the VA system, unlike McAnaw.

With the arrival of another OSC investigator on May 25, 1983, we hoped that someone had finally taken a genuine interest in our situation. I was interviewed on 3 occasions in person by this investigator, and thereafter fielded 27 phone calls and multiple letters in complying with OSC's request for documentation. On July 6, 1983, I was told that OSC had jurisdiction in my case, also, and this was reiterated by the succeeding investigator on December 21, 1983, who stated that the cases were interrelated.

The McAnaw suit proceeded to a non-jury trial before Judge Richard Rogers on July 18, 1983. By this time, however, it was limited to an EEO-type complaint and an APA hearing request because of the adverse effect of the *Bush* v. *Lucas* decision in the Supreme Court some 3 weeks earlier. The Rogers decision did not appear until October 22, 1984 and the conclusion of the court was that McAnaw had already had a full and fair intra-agency hearing before the VA at the 4110 proceeding.

Defendant's Supplemental Motion to Dismiss filed in the Brothers case in March of 1984 stated in part: "Here the plaintiff may initiate a proceeding under the Civil Service Reform Act by contacting the Office of Special Counsel. This same remedy was available to the plaintiff in McAnaw." On January 17, 1985, an investigator stated that the OSC would probably not be able to help McAnaw and that my case would probably be the next to fail in court. On February 5, 1985, 4 years after requesting assistance from the Office of Special Counsel, our attorney received the OSC decision not to prosecute the McAnaw case, even though it was felt that McAnaw had engaged in protected activity. The rejection letter stated: "We would be unable to overcome the agency's defense that she would have been demoted or reassigned, notwithstanding her disclosures." OSC also felt the preceding court decision weighed against any action on their part.

On June 30, 1986, 2 years after the exchange of supplemental motions for and against dismissal in the Brothers case, Judge Rogers issued a Memorandum and Order granting trial under the Bivens First Amendment Tort. The jury trial was held January 5 to 9, 1987, and on January 13, 1987 the jury returned its verdict awarding compensatory damages of over $90,000 and punitive damages of $50,000 against each of the 2 defendants, the former Center Director and the Chief of Staff. This verdict has been appealed through the Justice Department and is under consideration by Judge Rogers at this time. The verdict has been described by Tom Devine of GAP as demonstrating, "an inverse relationship between a civil service employee's tenured status and the strength of her rights." The verdict has certainly been hailed by those of us involved in the McAnaw-Brothers cases as vindication of our sustained belief that if the story could just be presented to an impartial jury it would finally be believed.

It should be mentioned that the FDA finally concluded an investigation into our combined allegations about the drug study, issuing a finding of "repeated or deliberate violation of regulations" in their preliminary report of 1982 and finding similar problems with a prior study of the drug Ludiomil in the final report of 1983. The study investigator signed an agreement not to conduct further drug research and transferred to the Topeka, Kansas, VA.

In concluding my testimony, I would like to say that I believe that OSC is totally ineffective as a remedy for whistleblowers. In our case alone OSC consumed 5 years, seven investigators, 15 letters, 63 phone calls, and countless hours of paralegal work on my part. Investigators demonstrated preoccupation with the media interest in the case, were fixated on finding the "smoking gun," told McAnaw there was no point in OSC helping her if she would decide not to remain in the VA, and even commented, "maybe we will not do anything because the courts may do it for us."

It was also mentioned that there was a need for OSC to, "protect their ass," with respect to media attention, particularly after "60 Minutes" made three trips to Leavenworth. Ironically, "60 Minutes" eventually shelved the story when it became apparent that VA patients were afraid to speak out on camera for fear their VA benefits or future care would be jeopardized.

Before departing as Special Counsel in 1982, Alex Kozinski stated, "If Congress wants a different office, then it is the responsibility of Congress to create an office that does something else." In 1983 the Supreme Court used the same argument in declining to provide further relief in *Bush* v. *Lucas*. The *Bush* decision was a 9–0 blow to all whistleblowers. As a result of *Bush*, we have been caught between the "devil" of the CSRA and the "deep blue sea" of the courts. Neither offers any substantial relief to whistleblowers.

In his farewell editorial on leaving the Federal Times in October of 1984, Keith Sinzinger related a story about interactions among whistleblowers. Sinzinger had received a recent call from a "tipster" who had himself received: "a 2 a.m. call that day from another whistleblower who was despondent over his treatment by the personnel system. The caller said he had a gun to his head and was ready to pull the trigger. He was talked out of the act, but not the idea. The tipster arranged for another whistleblower from a nearby State, to make an emergency visit to the suicidal colleague. The strength of this long-distance collective of cast-outs and complainers is the weakness—the possibly fatal flaw—of the Federal legal maze. Its compassion." I had a personal interest in that last column. I was the whistleblower who made the "emergency visit" to the "suicidal colleague." I am happy to report that he did not do it.

I have already sacrificed one career by becoming a whistleblower. In my new career in occupational medicine I will no doubt be faced with additional issues affecting the public health and safety. I would like to be sure that should I have to blow the whistle again, there will be a system in place which really does safeguard my rights and that protection promised against reprisal does not exist only on paper.

Mr. Chairman and Members of the Subcommittee, I do not believe that Senate Bill 508 as currently proposed offers adequate protection to the whistleblower. The McAnaw-Brothers cases clearly demonstrate the failures of the OSC. I know too many whistleblowers across this country, particularly in the VA, who can relate similar horror stories.

In her 1985 testimony on OSC before Representative Schroeder, Dr. McAnaw said: "While in theory the Office of Special Counsel is a splendid idea, in reality it is an ineffectual means of protecting whistleblowers. From my perspective at this time there is no justice at all in the Federal system for whistleblowers and I think it is time that we eliminated the illusion that there is, and that illusion is the Office of Special Counsel."

I agree completely with this viewpoint today in 1987. I am honored to have had the opportunity to address you. I only hope that there is a solution, that the right and duty to report wrongdoing will remain available and can be afforded better protection. I cannot afford to give up another career.

Thank you for your time and your attention.

Senator **Pryor**. Dr. Brothers, thank you.

I know that Senator Levin made some suggestions a few moments ago about our second hearing that we plan to have when we will call before this Committee the Office of Special Counsel and others. I know this would probably not be in keeping with the protocol of the past, but it would be interesting to allow these whistleblowers, Senator Levin, to come back for that particular hearing—the second hearing—and allow the whistleblowers the opportunity to cross-examine those people who allegedly represented them from the Office of Special Counsel.

I am not saying we are going to do that, but it certainly would be fascinating.

Senator **Levin**. At least give them a chance to comment on the testimony.

Senator **Pryor**. Yes, certainly a chance to comment on the testimony, but cross-examination would be intriguing. In fact, we may do that.

Dr. Brothers, in your dealings with the Office of Special Counsel, did you feel they were trying to help you or Dr. McAnaw?

Dr. **Brothers**. I felt all along that the McAnaw case was the central issue because of how it revolved around the Anafranil allegations, and I was willing to be the case that was piggy-backed upon that case, as long as it appeared that they were trying to do something to help us as a group.

We have always treated our case as a group case. The third whistleblower, the psychologist, is still at Leavenworth and the VA is trying very hard as we speak to remove that person today.

Senator **Pryor**. Just in a couple of sentences, the Anafranil case, as I recall, involved using an individual for an experiment, am I correct in saying that?

Dr. **Brothers**. Yes, Senator, correct.

Senator **Pryor**. And Dr. McAnaw saw this particular individual's case file and medical history and determined that this might be dangerous to that particular individual?

Dr. **Brothers**. Yes. The original determination was that the study investigator was placing patients with the wrong diagnosis on the study drugs. In fact, these people were specifically excluded by his own protocol from being placed on these drugs and he ignored his protocol.

Senator **Pryor**. What happened ultimately to that particular study?

Dr. **Brothers**. The Anafranil study?

Senator **Pryor**. Yes.

Dr. **Brothers**. I really do not know. It was being conducted by Ciba-Geigy at several centers across the country and I do not know if it has ever been concluded. Anafranil is still not on the market in the United States.

Senator **Pryor**. I see. Now, did you feel that the Office of Special Counsel was at least being impartial in their investigations?

Dr. **Brothers**. Not at all times.

Senator **Pryor**. Do you feel that the Office of Special Counsel vigorously pursued Dr. McAnaw's case?

Dr. **Brothers**. Not vigorously. I would say half-heartedly. We had a lot of hope, with the final investigator, that something would finally be accomplished. He seemed to take some genuine personal interest on his part, but then he later, I believe, had to transfer to the Spanton case and then we had two following investigators and things kind of went down hill from there.

Senator **Pryor**. How long did it take before the Office of Special Counsel even became involved, after Dr. McAnaw contacted OSC?

Dr. **Brothers**. My recollection is that it was at least one year before anything really happened and, in fact, things were dragging so long and our attorney was getting so frustrated that I finally called the Special Counsel myself to identify myself to tell them that I was a party to the case, to ask if I could help in any way. I told them I would be happy to talk to them to assist them, and I was basically told, well—by the investigator on the phone—I cannot comment on the case until I am minimally informed about it.

This was the person who said he did not know when he could come out.

Senator **Pryor**. How many people did the OSC interview in looking at the McAnaw-Brothers matter?

Dr. **Brothers**. To my recollection, every major party in this case, at least one dozen people. I was told periodically who they were interviewing. I was asked if I had opinions about certain parties on the other side of the case, and there were at least one dozen individuals, to my knowledge.

In fact, at one point I believe that OSC determined that during the 4110 proceeding there had in fact been an attempt by the VA counsel to bribe a witness to testify against Dr. McAnaw and that that testimony might be of great value in our case. But nothing further ever came of it after that time.

Senator **Pryor**. Now, you shared certain information at a period during this whole episode with the Office of Special Counsel. This information included tapes and transcripts which you had made during this whole process.

Dr. **Brothers**. Yes, sir.

Senator **Pryor**. Did you feel comfortable in giving OSC that information?

Dr. **Brothers**. Not really. It took me a long time to decide whether I should share tapes and transcripts with OSC, because I was very paranoid about the fact that they might share the information with the VA.

Senator **Pryor**. What happened to that information?

Dr. **Brothers**. Ultimately, I was able to use it in the court proceeding to demonstrate to the jury that the Center Director perjured her testimony by denying that she had ever accused me of writing an anonymous letter to the Inspector General or the Central Office of the VA.

Senator **Pryor**. What did the Inspector General do with your letter that you had written to that office?

Dr. **Brothers**. My letter was sent through the regional office of the VA to the Center Director's office. She received it on September 22, 1980. The initial identifying paragraph and my signature had been removed, but three sentences had been left in this letter with respect to the fact that I had been a resident-in-training there, that I had been aware of certain events since at least 1977, and that I was speaking out because unlike many other employees I did not depend on the VA for my sole source of income.

At that time I had three part-time jobs. I was the only staff member in that position. There was no question who wrote the letter.

Senator **Pryor**. Once Dr. McAnaw had shared her concerns with you about the study—this was the Anafranil study—did it become obvious to you that the Chief of Staff and the Center Director were trying to stop Dr. McAnaw from sharing her concerns with other people?

Dr. **Brothers**. I am not quite sure I understand your question.

Senator **Pryor**. Did the Chief of Staff and the Center Director want Dr. McAnaw, let's say, to share her concerns about the study? And what did they do to prevent her from sharing it?

Dr. **Brothers**. Very simply they removed her from the Leavenworth VA, and every investigation that we assembled, including appeals to the VFW, the American Legion, the IG offices, everything, the outcome was always in favor of the VA. Some investigators admitted to witnesses of ours that they were friends of the director, this kind of activity.

Senator **Pryor**. Now, the Chief of Staff appointed an investigating team, I believe, to look into the allegations about the Anafranil study, is this correct?

Dr. **Brothers**. Yes, sir.

Senator **Pryor**. Is it true that one of the members of the investigating team appointed by the Chief of Staff was the wife of the Chief of Staff?

Dr. **Brothers**. No, sir, that is not correct. I do not believe she was asked to investigate the study, but the IG found she was an unnamed co-investigator performing under the Chief of Psychiatry while the study was going on.

Senator **Pryor**. So she was involved at least indirectly in the investigation?

Dr. **Brothers**. In some fashion she was involved.

Senator **Pryor**. I see. A few more quick questions, and then we'll move to Senator Levin.

When did you find out that the Inspector General had released your first letter to them to the Director of the VA Center? When did you make this discovery?

Dr. **Brothers**. It was in the fall of 1980. What actually happened was that Dr. McAnaw was called by the Director one day who said to her, "why did you write a letter on your behalf to Washington?" When Dr. McAnaw said, "I do not know what you are talking about, send me a copy," she was given a copy of my edited letter to the IG. That is how we obtained it.

Senator PRYOR. Did the Inspector General ever contact you and tell you that he had released this letter that you had written?

Dr. BROTHERS. No, sir.

Senator PRYOR. When you sent that letter, did you believe and hope that the information would be kept as confidential information?

Dr. BROTHERS. Yes, sir.

Senator PRYOR. After you began working with the Office of Special Counsel did the Inspector General help or become involved with the Office of Special Counsel investigation?

Dr. BROTHERS. I do not know that, because that would have been in 1982 or 1983, long after the IG had completed their audits at Leavenworth.

Senator PRYOR. Dr. Brothers, one final observation, and then we will let Senator Levin ask some questions. In my 8 or 9 years in the Senate, I do not believe that we have ever had a witness before any Committee that I have been involved with that has had better documentation than Dr. Brothers, who is now in the witness chair.

It is meticulous. Over the weekend I think I read almost every word of your documentation. I was very, very impressed. I applaud you not only for the way that you have kept these records and laid out this case, but once again, as I have said to the other whistleblowers, I think that many, many thousands of Federal workers owe you a debt of gratitude.

Senator Levin?

Senator LEVIN. Thank you, Mr. Chairman and Dr. Brothers.

As I understand the process, you did not file a complaint with the Merit Systems Protection Board or the OSC because you did not have the right to, because you were a part-time, temporary employee, is that correct?

Dr. BROTHERS. Yes, sir.

Senator LEVIN. Our bill would allow you to file a complaint with the OSC and the MSPB. It would allow both part-time employees and full-time employees to go to the OSC and then appeal that decision to the Merit Systems Protection Board. That is another change that would be provided for under the bill, so that there are two procedural changes there which would make it possible, at least, for you to get to the Merit Systems Protection Board.

The real question is, do you want to get to the Merit Systems Protection Board, or would you rather rely on court?

Dr. BROTHERS. That is very difficult to answer. I think in my case I have gotten farther in the court than many other people whom I know. Now, I am not enough of a legal person to know about these issues, but frankly, my opinion is that the courts at the moment, or possibly some sort of arbitration, would probably accomplish more faster and cheaper than the Office of Special Counsel as it now exists.

Senator LEVIN. The Office of Special Counsel took 3½ years to resolve the McAnaw matter, and then they dismissed it, as I understand it.

Dr. **Brothers**. Yes, sir.

Senator **Levin**. What was the reason for that length of time, in your estimation?

Dr. **Brothers**. Well, there were many reasons, I suppose. We kept having a change of investigative office. We had several investigators. One of them was Ms. Oskoui, who has already been mentioned by another witness. At one point they said they had no travel money, but I thought it was rather strange that while they had no travel money they could detail one of our people to Europe on an assignment. I thought that was a little humorous. It made me wonder about their use of taxpayers' funds.

I cannot say that they ever gave us any specific reasons when they finally rejected the case. At one point, Mr. Collins, the Assistant Special Counsel, told me in a telephone conversation that they were having to apply the so-called "but for" test and until they had done that, or unless they could do that, they could not help Mary McAnaw.

Very interesting to me was the fact that the same "but for" test was cited in their rejection of her case.

Senator **Levin**. Your case and the McAnaw case were linked and piggy-backed together by the OSC in some way, but ironically because you were a part-time, temporary employee, you have now gotten relief. Dr. McAnaw, who was a full-time employee, is out of luck.

Dr. **Brothers**. That is correct.

Senator **Levin**. That is where we have ended up because of the way in which the law currently treats differently part-time and full-time employees. That would be corrected, for the better, or worse, again. Hopefully, we can strengthen the OSC so that it is for the better, and that we can make that office truly an advocate for whistleblowers and a protector of whistleblowers and not a threat to whistleblowers and not a place where whistleblowers' complaints end up being filed or mistreated for 3½ years. That is what we are trying to do.

If we succeed in strengthening the OSC, then I think it would make a lot of sense for Federal employees, part-time, and full-time, to be able to go to the OSC and have an appeal to the Merit Systems Protection Board so that then we can have an administrative procedure which works and really provides rapid, efficient, fair and just protection, rather than the current system we now have.

But anyway that is the purpose of the bill. You made some reference to it. You were dissatisfied with its strength, and any particular comments you have to strengthen the bill, I think, would be welcome, either at this time or later. If you have specifics, I know we would welcome them.

Dr. **Brothers**. Well, I think, again, I would just ask that you might consider at least some form of arbitration. Because I think from what little I have heard about it from talking to other whistleblowers and to attorneys who have testified previously at other hearings, that arbitration appears to have much more success than the OSC, or even the court system, which I think certainly takes a long, long time. And in fact, as I mentioned before, my own verdict is under appeal, and the Judge does have the right to withdraw the verdict if he so chooses.

Senator **Levin**. Thank you.

Senator **Pryor**. You know, I sat, Senator Levin, over the weekend reading these four cases, and every time I read one of the cases, I said, my goodness, nothing can be worse than the one I have just read and studied. But what we see today are four individuals who have come before the Subcommittee, and I am thinking about the 400 or the 4,000 or maybe the 40,000 out there who might have cases as equally as important to this Subcommittee as these.

But let me read, if I might, Senator Levin—I am just going to put this in the record. I will put the full text in the record, but Dr. Brothers in her affidavit has stated this, and I conclude, and I think it is almost like a subtitle at the end of a movie:

Dr. Mary Brothers has changed careers, having completed a mini-residency in occupational medicine at the University of Cincinnati from 1982 to 1984. She has served as President of the Great Plains Occupational Medical Association, obtained a Fellowship in Occupational Medicine in January of 1987, and has just been appointed to the Ethical Practices in Occupational Medicine Committee of AOMA. She continues to practice in Kansas City, Missouri. Dr. Mary McAnaw is currently Assistant Chief of Surgery, VAMC, Kansas City.

The Chief of Psychology at Leavenworth VA decided to take early retirement after receiving his first poor proficiency rating in 43 years of Federal service. He is now in limited private practice in Lawrence, Kansas.

The Staff Psychologist who first identified the Anafranil problem has been under increasing pressure to leave the Leavenworth VA. He is seeking assistance through the union, and goes to arbitration later this year.

Several other staff physicians who tried to assist Dr. McAnaw also received mediocre ratings and/or decided to leave the VA. They are now in private practice in various locations throughout the United States.

I think our witness has served a real purpose in this statement in finding this fact: In 1983, 3 of the 99 nurses at Leavenworth VA received critical comments on their performance evaluations from their superiors. Those three who had received critical comments had also testified for Dr. McAnaw. The Anafranil Study Director was censured by the FDA in their Final Report [June 23, 1983], as in the preliminary report of 1982 for, "repeated or deliberate violations of regulations." After signing an agreement not to engage in drug research, he transferred to a staff psychiatry position in Topeka, Kansas, VA.

The former Center Director, Leavenworth VA, accepted a transfer to VA's Regional Medical Education Center, St. Louis, Missouri, and is now retired. And the Chief of Staff, Leavenworth Veterans' Administration Hospital is still in that position. His wife continues to work in the Psychiatry Service at Leavenworth.

Dr. Brothers, we owe you a great debt of gratitude.

Senator Levin?

Senator **Levin**. I just have one additional question if I could, Mr. Chairman, or rather one additional point.

You made reference to the "but for" test, and our bill does seek to address that problem by providing that if the employee shows that reprisal was a cause of the action taken against her, you do not get to the "but for" test.

In other words, we avoid that problem, that very difficult causation problem, which is always difficult in any kind of litigation. But what we say here is that if you show that reprisal was a factor, that it was there and was a cause, then you do not have to prove that but for that particular cause, the action would not have been taken.

So we seek to address it, I think, in a fair way and any comment that you or any of our other witnesses or counsels here have on that aspect of the bill, or on any other aspect of the bill, either today or for the record later on, would be welcome.

But I did want to, because Dr. Brothers mentioned the "but for" problem, at least indicate that we tried to address that very difficult, complex issue.

Dr. **Brothers**. I think that would be very important, and of all the other similar VA cases of which I am aware, that seems to be an issue that is used by the Special Counsel to shoot them all down. We know of at least eight other VA cases, two of which are in our same area of the country.

Senator **Levin**. Thank you, Doctor.

Senator **Pryor**. Thank you, Dr. Brothers.

From our next witness we are going to hear what happened to a gentleman by the name of Mr. Timothy Reid of San Diego, California. Mr. Reid exposed waste in a U.S. Navy overhaul project and found himself being investigated and transferred.

Mr. Reid, we look forward to your statement.

Mr. **Reid**. Mr. Chairman, members of the Subcommittee, I thank you for the honor and the privilege of appearing before this distinguished Subcommittee in its legislative deliberations for the strengthening of whistleblower protections for Federal civil service employees. I hope to provide testimony which will demonstrate the urgent need for enhanced intervention and enforcement in cases where Federal employees bring forth objective criticism or otherwise disclose information with the intent of improving the integrity and efficiency of Government operations.

In respect for your schedule, my statement will be a brief summary of the written statement and supporting documentation I have previously submitted for the record.

Seven years ago I began my career with the United States Navy. I am proud to work for an organization with a history as rich and a tradition as noble as the Navy's is. My statement today reflects my own opinion on personnel issues. It is not intended to represent or preempt the Navy's official positions.

In 1980 I was assigned to a submarine communications program referred to as Sea Nymph. Through my responsibilities on this program, my colleagues and I began to witness examples of irrational and inefficient methods of procurement which for a variety of complex reasons are utilized within the Department of Defense. In July of 1983 I began to report the poor performance of a Defense contractor working on Sea Nymph systems.

My reports were made through chain of command. Although some of my concerns had already been verified, certain officials began to treat me in an adverse fashion. This treatment has continued to include arbitrary and baseless investigations, all unsubstantiated, false character defamations, an unprecedented security access revocation, repeated job transfers and a host of other reprisals clearly designed to discredit me, and thereby discredit my disclosures.

As I elevated my concerns to higher offices for review, retaliatory actions increased proportionately. This spring representatives for the Office of the Secretary of Defense acknowledged that false charges against me had been engendered and disseminated by officials responsible for investigating my disclosures.

One official falsely advised the Secretary of the Navy that I was a convicted criminal. I note here that I have never been charged with any crime ever. Another official acting on other false information wrote that I was a pitiful criminal, and, in a second and even more reckless memo to another employee, compared the crimes he wrongfully thought I had committed to the types of crime committed by people like Ed Meese and Richard Nixon.

When I complained about these incredibly slanderous charges, the high command official responsible for investigating my disclosures recommended that I be fired from Government service for revealing the existence of the official memos.

My greatest concern in disclosing the information I have is to protect the efficiency and effectiveness of a Navy program known as the Sea Nymph Overhaul program. This program had been in planning at my Navy command for many years by 1983. An extensive report issued by Navy experts in November of that year recommended that this program be fully planned, implemented and managed by the Navy in order to perform the work required in a timely and efficient manner.

This identical program was then awarded to a Defense contractor on a non-competitive basis. The cost associated with this contract could total as much as $200 million more than original estimates for the same product. I objected to this glaringly bad plan and recommended several alternatives to improve it.

In 1985, after advising my entire chain of command of my disclosures, I contacted the Honorable Jim Bates of San Diego. Subsequent to inquiries by Congressman Bates, partial Naval reports were finally issued internally, confirming that my allegations had surfaced many serious problem areas at my Navy command.

Additionally, I then discovered that the contractor given the award was then under indictment by the Justice Department—and eventually pleaded guilty to—theft of sensitive Pentagon documents and conspiracy to defraud the United States on the very types of procurement that the Sea Nymph Overhaul program is, that is, an electronic warfare procurement.

Despite this, reprisals continued against me until I finally decided to request investigation and corrective action by the Office of Special Counsel in January 1986. I contacted the Special Counsel with the intent of not only protecting my career, but also with the hope that they would protect the best interests of national security and the Merit Systems principles.

I expected the Special Counsel to be an avenging angel. Nothing could have been further from the truth. Their involvement in my case served only to augment reprisals against me and to further jeopardize the proper response to Congressional inquiries regarding my disclosures.

From the outset of the Special Counsel investigation, beginning with their intake processing, I felt as if I were being run through a bureaucratic gauntlet. It required 6 months of painstaking effort before OSC initiated a rarely utilized field investigation. In September, 1986, the field investigator selectively took affidavits of only those witnesses expected to support the positions I was challenging.

He apparently entered into a blind trust with the charged officials, accepting all they said at face value and reporting it as fact, in ignorance of conflicting and more cogent evidence. He incited false statements regarding my work records, my disclosures, my credibility and my character. He then chose not to report the problems and wrongdoings previously and later acknowledged by the DOD, while simultaneously including obviously false and malicious allegations against me. He also coached and counseled charged officials to my detriment.

The most cursory examination of Special Counsel's Summary Report reveals a prejudiced investigation, faulty reasoning, inaccurate and incomplete conclusions, presented in a dissembling fashion. When I was finally granted a partial copy of the Special Counsel file for this case, after Congressional request, I was appalled to discover that an organization with a mission so critical could be so ineffective.

Perhaps in my case the field investigator was only a loose cannon on the gun deck of OSC, but this fact alone would not explain the arduous intake procedures I faced, nor the colorable and incomplete decision offered.

My advice to Federal employees considering their duty under law to report substantial wrongdoings or misappropriations would be not to do so under the current legislation, unless they possessed the resources and credentials of an attorney, a certified public accountant and an ordained saint.

In many ways I, have been fortunate over the last 4 years. Through my efforts and experiences and those of many others, I have learned the most effective channels and procedures for disclosing and correcting serious procurement problems within Government. I have also discovered some of the dangers and difficulties which can trap and betray a bona fide whistleblower. I believe OSC can be one of those traps.

I am proud to say that in 1986 I used my experience to benefit the United States by issuing a second set of disclosures. The actions taken by Congressman Bates and the Department of Defense on these disclosures will result in saving millions of dollars at many military facilities across the country.

But these disclosures were nearly rebuffed and severely compromised because of OSC's failure to act in the best interest of Government on my case. I believe new OSC legislation could prevent similar failures and thereby encourage Federal workers to save billions of dollars of potentially wasted funds.

I thank you once again for this privilege and in particular I would like to express my deepest appreciation to you, Senator Pryor, and to Congresspersons Jim Bates and Patricia Schroeder for their help, and to the Department of the Navy.

Senator PRYOR. Thank you, Mr. Reid.

Speaking of Congressman Bates, you first took this problem, I believe, to Congressman Bates, is this correct?

Mr. REID. I first took my disclosures to the chain of command in the Department of the Navy. Subsequently I brought my personnel problem to both Congressman Bates and Congresswoman Patricia Schroeder. In June of 1985 I brought my disclosures to Congressman Bates.

Senator PRYOR. Right. Now, I have a copy of a memorandum, and I think you obtained this through the Freedom of Information Act, if I am not mistaken. I am not certain who signed this but I believe it was written by Glenwood Clark, Commander, Department of Space and Naval Warfare, dated March 3, 1986. It refers to a report I assume was given to Commander Clark by his subordinates.

Let me read paragraph A: "Secretary of Defense and Congressman Bates must be told that Reid was found guilty of fraud in connection with official travel. We"—I guess that refers to the Navy—"do not want them to perceive that Mr. Reid is a trustworthy individual. It is important that Congressman Bates be told that suggestions of reprisal by Mr. Reid stemmed from his own fraudulent activity. The memo and letter have been rewritten to reflect this recommendation." Period and end of paragraph A.

Now, what was all of this about? What were your allegations of fraud?

Mr. REID. Well, sir, my disclosures inside the Department of the Navy have been investigated by Inspectors General among other people. One of the Inspector Generals who has been determined to author this document and Glenwood Clark, I guess, signed it out to the Secretary of the Navy, possibly with a vested interest in not letting these problems surface. I do not know, but the intent, I believe, is to destroy my credibility so that the proper response to the disclosures will not take place.

Senator PRYOR. This was over a travel voucher, or two or three travel vouchers, as I recall, is this correct?

Mr. REID. One of the first reprisals following my disclosure was initiation of a travel investigation into all of my travel claims over a period of 3 years—512 days. A portion of those travel claims were determined as questionable. No charges were ever brought.

Senator PRYOR. You paid this money back, I think, under protest to the U.S. Government.

Mr. REID. I paid the money back with the stipulation that I did not agree with it.

Senator PRYOR. Ultimately were you not exonerated from this particular charge?

Mr. REID. I was investigated for submitting fraudulent travel claims and I was exonerated from that charge.

Senator PRYOR. You were exonerated?

Mr. REID. Yes. From the charge of submitting fraudulent travel claims.

Senator PRYOR. By whom?

Mr. REID. By the Department of the Navy.

Senator PRYOR. By the Department of the Navy. So these charges were not true or valid?

Mr. REID. They were not true.

Senator PRYOR. The Navy wanted to discredit you with Congressman Bates, is this correct?

Mr. REID. Well, sir, I would rather phrase this that people abusing their authority within the Navy attempted to discredit me with Congressman Bates.

Senator PRYOR. You are very diplomatic and I must say, extremely kind in this case.

Now, you went to your superiors and you said, there are some problems in this contract. The work is shoddy and it is costing too much. What happened after that? How soon after that were, let's say, reprisals taken against you?

Mr. REID. Well, the reprisals began in mid-1983 and have continued until very recently, so there is a long series of reprisals. But to give you an overview—

Senator PRYOR. If I may ask, did the reprisals take place after you blew the whistle on a contractor and the work that they were performing?

Mr. REID. Yes, without question.

Senator PRYOR. The reprisals were after that, is this correct?

Mr. REID. The reprisals were afterwards.

Senator PRYOR. No reprisals before that?

Mr. REID. No, sir. The disclosures began in approximately July of 1983. The first reprisals for releasing those disclosures began in August of 1983, and then a continual process since, I believe.

Senator PRYOR. So your punishment began basically when you started blowing the whistle?

Mr. REID. Yes, sir.

Senator PRYOR. Did the OSC take these findings into consideration when it issued its final report? And the findings I relate to, I should state, were findings that some of your disclosures were correct. In other words, they were shoddy, it was a huge overrun in the process and there was no competition for the bidding. Did they take this into consideration in your case?

Mr. REID. No, sir. I should point out that in reading the OSC's final decision, one would come away with the determination that my disclosures followed the travel claims investigation launched against me. To come to this written decision, OSC ignored a major piece of evidence, which was a Department of Navy finding that reads that "Mr. Reid's allegations of fraud, waste and abuse began in June, 1983." The travel claims investigation was not initiated until October of 1983.

Senator PRYOR. I see. The travel claim investigation was, once again, after your allegations were made about the contractor?

Mr. REID. Yes, and OSC ignored that.

Senator PRYOR. Right. What type of response, Mr Reid, did you receive from the OSC once you contacted them about the harassment that you were experiencing?

Mr. REID. Initially, in their intake procedures, there was a great feeling conveyed to me of disinterest and even dislike that I was contacting the organization. I did not know how to proceed with that. I sought representation through Mr. Shiposki, who is here today, with the Whistleblower Intervention Network. Then I learned of the pitfalls, and of how not to appeal to OSC.

There are three stages, basically: an intake procedure shown disinterest until I brought in Mr. Shiposki, and then I sought representation through Congresswoman Schroeder and Congressman Bates. With that, there was a great feeling of resentment shown towards me.

Senator PRYOR. Mr. Reid, did the Office of Special Counsel take affidavits from all of the relevant witnesses in your case?

Mr. REID. No. When I met with the Special Counsel investigator, I named the witnesses——

Senator PRYOR. You gave them the list of witnesses?

Mr. REID. I gave them the list of witnesses that could be expected to testify for the side of the opposing view and from my view. They decided to only take affidavits from the people who were on the opposing view side. After insistence, they did make two telephone calls to other witnesses on my behalf—no recorded record of that—and they failed to contact other very important witnesses.

Senator PRYOR. So, no affidavits were taken, only telephone calls?

Mr. REID. That is correct, to the people who would be expected to support what I had to say.

Senator PRYOR. Your position?

Mr. REID. Yes.

Senator PRYOR. Those people who were supporting your position were not asked to provide an affidavit. They were merely called on the telephone and no record of those conversations in the record, is that correct?

Mr. REID. A couple of them were called on the telephone, a few were ignored completely.

Senator PRYOR. Now, one of the OSC's reasons for closing your case is that they could not prove that you had been making your disclosures in July of 1983. Was there evidence available to the OSC as to when you actually began making your disclosures about the contractor?

Mr. REID. Yes. There was a set of findings released by the Department of the Navy, the result of administrative proceedings from March 1984 to March 1985. The number one finding in that, which I have just read, pinpointed the date of the beginning of the disclosures in June 1983.

Senator PRYOR. But did the OSC consider all of this evidence when they made their final decision?

Mr. REID. I believe they considered it and changed the evidence.

Senator PRYOR. I believe you made a second set of disclosures, I guess it was 1986 by then. To your knowledge, did the interventions of the Office of Special Counsel work to discredit this second set of disclosures? Were they trying to discredit what you were saying about the contractor?

Mr. REID. OSC was retaliating against me and trying to discredit my very character, and in doing so, they jeopardized the disclosures which I have revealed. There was a great delay in investigating the second set of disclosures, and a great lack of interest on the part of the Navy, because of OSC's involvement in my case.

Senator **Pryor**. What is your present position, Mr. Reid?

Mr. **Reid**. I am an electronics engineer at the same Navy command where I began my career.

Senator **Pryor**. At the same command in San Diego?

Mr. **Reid**. The same command in San Diego, yes.

Senator **Pryor**. You mention in your statement—I do not have the page numbers—but I notice you say: "I believe OSC, the Office of Special Counsel, can be one of those traps."

I assume you mean traps for the whistleblower. Talk about that a moment.

Mr. **Reid**. Yes. I think OSC, certainly from what I have seen in my case, does not act in support of the whistleblower, but acts to get rid of the whistleblower, in more than one way. By being a trap, I mean that by taking your problem to OSC, you are damaging whatever support that you have and further jeopardizing your career.

Senator **Pryor**. I am a laymen in this area and this question is sort of irrelevant, I might add. What is the Sea Nymph systems program?

Mr. **Reid**. Well, Sea Nymph is an electronics communications system that goes onto submarines in the U.S. Navy.

Senator **Pryor**. For submarines?

Mr. **Reid**. Yes.

Senator **Pryor**. Now, my next question is, and the reporter does not even have to listen, did you read "Hunt for Red October"?

Mr. **Reid**. No, I have not. It was too classified. [Laughter.]

Senator **Pryor**. Now, a final question or two. What did the OSC finally do with your case? What was the final disposition of your case?

Mr. **Reid**. They issued a final decision in December of 1986 saying that reprisals were not a significant reason for the suffering that I had gone through.

Senator **Pryor**. It was not a what?

Mr. **Reid**. A significant reason for the suffering that I had endured. A significant factor, I believe, are their words.

Senator **Pryor**. Is there any idea how much your disclosures against the contractor saved for the American taxpayer?

Mr. **Reid**. There are a number of ideas. There is general disagreement in that there is not communication between Congress and the Navy of any substance. Some people have estimated it as high as a $200 million. Others think that it is at $80 million. I cannot answer that question.

Senator **Pryor**. I think that is interesting. At the very least, the savings would total several million dollars. I think the entire appropriation for the Office of Special Counsel is $5 million. I believe for the whole operation costs $5 million and employees 84 staff people.

Did you ever get any kind of an award or any kind of a certificate?

Mr. **Reid**. Far from that.

Senator PRYOR. You didn't receive any kind of Certificate of Merit, and President Reagan didn't call you up and say, "thank you, Mr. Reid, for saving all of this money for us"?

Mr. REID. I have received a lot of thanks from certain people, but not officially.

Senator PRYOR. Not official. Has the Navy thanked you? Has anyone in the Navy thanked you?

Mr. REID. No. But I should qualify that by saying that the people up top are not being fed correct information on my disclosures.

Senator PRYOR. Well, there is a group called the National Taxpayers Union. I bet you I can get them to write you a nice letter. I will try to.

Mr. REID. Thank you, Senator.

Senator PRYOR. Maybe you can put it on the wall.

Well, once again, I do not want to make light of this, because all of you this morning have been splendid witnesses. You have made a case about a bureaucracy that, in my opinion, is very insensitive to its mission that we tried to design in 1978.

I think we have got to go back and look at the present law. I am very proud to have the suggestions of Dr. Brothers. I welcome the suggestions of Mr. Reid and the other witnesses today as to how we might strengthen this legislation. Believe you me, it was our intent to create a better system, but sometimes we fail. I think this time we went about two-thirds of the way, and now we need figure out how to really go the rest of the way. Your statements today and your caring and your courage have certainly enhanced the possibility that we can now analyze your cases and other cases like yours and go forward with trying to make the system better.

We are very, very much in your debt.

I believe that Mr. Shiposki has a statement for the record. I should have recognized you.

Mr. SHIPOSKI. Mr. Chairman, I do have that statement. But before I read the statement, if I might, I would like to make one quick comment as to your mentioning the entire operation of Special Counsel being at $5 million and that Mr. Reid's disclosures would probably exceed that amount many times over. I believe that has been mentioned in the last several days as we have made arrangements with the Committee, but one overall impression was—and it was shared by someone else—was that the Office of Special Counsel and the system is not user-friendly.

Senator PRYOR. Not user-friendly?

Mr. SHIPOSKI. Not user-friendly.

Senator PRYOR. That is kind of like the IRS. They are not very user-friendly.

Well, you do have a statement, Mr. Shiposki, for the record?

Mr. SHIPOSKI. Yes, sir. Mr. Chairman, the opportunity to appear before the Senate Subcommittee on Oversight of Government Management with Mr. Tim Reid is both an honor and a privilege. My experience with the Office of Special Counsel began in 1979 as a representative of Federal employees with the American Federation of Government Employees.

In late 1985, a small group was formed in San Diego called the Whistleblower Intervention Network, in the hope of assisting Federal employees in their complaints against reprisal for what were believed to be protected activity disclosures.

In early 1985 we were successful through Congressional intervention in causing the issuance of regulations by the Department of Defense in implementation of 1983 legislation by Congress in which whistleblower protections were extended to over 177,000 non-appropriated fund Government employees.

Prior to representation in Mr. Reid's Office of Special Counsel processing, most reprisal complaints were rejected by Office of Special Counsel through the expedience of deferral to other sources as they determined that the complaint submitted could be resolved more appropriately under other agency appeal procedures.

From 1979 to 1983, three complaints were given field investigation but were closed without corrective action. The cycle of rejection led to a conclusion that the complainants were instead better served by petitioning Congress when their complaints disclosed evidence of waste, fraud or abuse of authority and ensuing reprisal.

In Mr. Reid's Office of Special Counsel investigation, conducted by a former Civil Service Commission Hearing Officer, it became apparent that his concern with Congresswoman Schroeder and Congressman Bates interests was a significant factor in what records now reveal to be an investigative attempt to discredit and impugn Mr. Reid's integrity.

Those outer limits were reached while not requiring the agency to produce its own investigative reports or releasable record requested by Mr. Reid since 1983 through Freedom of Information Act petitions.

It became obvious from the file and report received in 1987 that the Office of Special Counsel was extending a significant measure of deference and partiality to Department of Navy management officials, even though Mr. Reid's petition and complaint of prohibitive personnel practices alleged in part that the agency's recalcitrance through delay, non-disclosure and disinformation was an abuse of authority and indicia of a retaliatory motive.

As the emerging anomaly of protecting the agency and not the complainant became painfully evident, Senator Pryor was notified on July 6, 1987 that a significant omission was discovered upon closer examination of the Special Counsel Report of Investigation and the file.

For the sake of brevity, I will not read into the record, Mr. Chairman, that letter to you, but I will mention and paraphrase it by stating that the core of Mr. Reid's complaints—complaints, by the way, that were requested by the Office of Special Counsel—were entirely omitted from investigation or inclusion into their own record.

While I characterize this as suppression of the complaint as being a form of cruel hoax upon a complainant, the Office of Special Counsel correspondingly makes a mockery of its own processing regulations and the Reform Act principles it is sworn to uphold and protect from transgression.

From the significant omission, the conclusion was reached that the Office of Special Counsel investigation was itself a reprisal for petitioning concerned and involved Members of Congress for intervention and assistance. The expanded protections that Senate Bill

508 introduces, if enacted and publicized at an earlier time, might have deterred the agency's retrenchment against Mr. Reid's continuing efforts to prevent gross waste of Government funds and overcome the Special Counsel's reluctance to seek appropriate measure of vindication and cessation of a demonstrated pattern of reprisal.

S. 508, in my opinion, rightfully defines and reemphasizes the purpose of Special Counsel, by designating its primary role to the protection of employees. It reverses a trend of non-enforcement that eroded the confidence employees who had or might have brought disclosures benefitting the efficiency and economy of the Government.

Senator **Pryor**. Mr. Shiposki, if I might, we are about out of time. I not only appreciate you being here, I appreciate your statement. We will put all of that statement in the record.

I extend to all of you an invitation to work with this Subcommittee as we examine S. 508 to see how we can make it as strong and as protective of the Federal worker as possible. I think you all have great expertise in this. We would value your opinion and the opinions of Mr. Reid and Dr. Brothers.

In fact, Dr. Brothers is not only a splendid surgeon, she would make a whale of a lawyer. I once again compliment all of you for sharing your experiences with us. We thank this panel. Thank you very much.

Mr. **Shiposki**. Thank you, Mr. Chairman.

Dr. **Brothers**. Thank you.

Mr. **Reid**. Thank you.

Senator **Pryor**. Our next panel consists of Dr. Donald Soeken and Mr. Edward Wright.

Mr. Soeken is a psychologist who has worked with many whistleblowers and has publicized the results of his research on the plight of whistleblowers. Mr. Wright is the legal counsel to the Whistleblower Coalition, a group of noted whistleblowers in the Washington area.

This Coalition is very familiar with the problems that face whistleblowers and is going to provide the Subcommittee with legislative recommendations.

Gentlemen, once again, we apologize for keeping you here all day. You are the last panel, and I know that you have found this hearing as fascinating as I, and other members of the Subcommittee, have. We would like to encourage you, if we might, to keep your remarks short.

So first, we will hear from Dr. Soeken.

TESTIMONY OF DONALD R. SOEKEN, PH.D., ASSOCIATION OF MENTAL HEALTH SPECIALTIES, WASHINGTON, DC; AND EDWARD E. WRIGHT, WHISTLEBLOWER COALITION, WASHINGTON, DC [1]

Dr. **Soeken**. Thank you. I would like to thank the Chairman for asking me to speak before this Committee.

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[1] See p. 217 for Mr. Wright's prepared statement.

My wife and I want to submit the results of a recently completed survey of whistleblowers. As we have stated in other hearings, we are very concerned about how the Federal Government treats its most important ethical resisters. The results of our survey demonstrate an overwhelming disregard for these Federal employees. By default, most help is given to those employees who are the target of the whistleblowing. It appears that in the haste of enacting a Whistleblower Protection Act of 1978 the Congress has erred in favor of management.

There appears to be a problem with morale among the Federal whistleblowers. It seems perfectly clear to me that the MSPB and the OSC satisfaction with the present law flies in the face of facts that indicate that whistleblowers are not protected under it. The destruction of the lives of individual Federal employees who blew the whistle is proof that they are not being protected. If Federal employees are being destroyed and not protected by the current law, then why are the protectors so satisfied? Perhaps those detectors do not want the whistleblowers to speak out.

We are faced with many complicated issues that cannot be dealt with in these hearings, but I fear a disaster for the Federal merit system if the cries of the whistleblowers are not heeded. If the machinery for the protection of whistleblowers has failed in the cases we have surveyed, then it apparently is not adequate. We are dealing here with the morale of a group of Federal employees who, we have discovered, are generally likely to apply universal morale codes in their behavior.

It seems obvious to me that in practice it would be better not to be a whistleblower. High morale values just do not pay off in Government service. What, then, are we to do with this group of employees?

The code of ethics for Government service does not say that one should overlook waste, fraud and abuse. Rather, it says, put loyalty to the highest morale principles and the country above loyalty to persons, party or Government department. This Committee, I believe, is left with a dilemma of critical importance, since few whistleblowers place any faith in the Government to protect them from serious retaliation.

If this Committee, Congress and the American people do not want unethical behavior to be rewarded, then the results of this study should be heeded. The truth is out. We are not only killing the messenger, but we are ignoring his cries for help.

Almost one-third of the respondents advised potential whistleblowers: "Don't do it." Almost one-half warned to expect retaliation, financial loss and mental anguish.

If there is no protection, then I think the Federal whistleblower is in real trouble when he points out waste, fraud and abuse. One is left with choosing between his Federal career or the code of ethics. This is unfair and places the freedom of speech outside of the reach of all Federal employees who are ethical resisters.

In conclusion, I would like to quote the new Special Counsel of the MSPB, "It is vitally important that whistleblowers not suffer any form of reprisal, and it is important that government officials and whistleblowers know there will be vigorous enforcement of that protection." This committee, members of Congress, and all of us will be watching to see that these were not just idle words.

I was going to read the highlights of my study. Would you like for me not to do this?

Senator PRYOR. I would like, Dr. Soeken, if you would, to put the highlights of that study in the record. I am fascinated by that.[1]

Do you want to mention one or two facts out of that study, and then we will go to Mr. Wright?

Dr. SOEKEN. You will have the study in the record. Let me just talk a little about the retaliation.

Senator PRYOR. I have got some questions I am going to ask you about retaliation.

Dr. SOEKEN. Why don't you ask me the questions.

Senator PRYOR. Why don't we do that in a moment. We will hear from Mr. Wright and then I will ask you a few questions that might allow you to expand on your testimony.

Mr. Wright, we appreciate you being here.

Mr. WRIGHT. Thank you, Mr. Chairman.

The Whistleblowers Coalition was formed a few months ago for the express purpose of presenting testimony to Congress, and particularly to this Subcommittee. Our reason was that we felt that this was the only opportunity we could see for some time in Congress to achieve reform legislation and we wanted it to turn out that whatever was adopted would be as realistic as possible.

I do not have time to summarize the 11 specific recommendations which are made and which are included in my written statement.

Senator PRYOR. They will be a part of the record.

Mr. WRIGHT. I would like to touch on three aspects of particular importance I think worth stressing.

The first is that the Coalition feels strongly that protection for whistleblowers is in the national interest and that it is important that this Committee and Congress fully appreciate the extent to which abuse and corruption and mismanagement is prevalent throughout Government ranks.

I happened to hear on the radio this morning as I was driving in a quote from Will Rogers. He was quoted as saying: "It is a good thing we don't get all the Government we pay for."

Behind that observation is a pretty cynical view that supervisors and managers at all levels, including heads of agencies, are human beings and utilize their positions of office for various reasons that are not in the public interest. We have heard from four individual whistleblowers this morning.

One of them, Dr. Brothers' story, probably illustrates the prevalence of incompetence in many Government agencies, professional incompetence. A very important study was taking place which should have been handled with greater care, as it affected human lives.

In the case of Mr. Reid, we had intimations of the extent to which industries which are regulated by the Government, or which are seeking Government business, act to influence Government officials at all levels. They do it in order to further the interest of their company. The employee is receptive to this kind of influence to feather his own nest, to secure a position after leaving the Government that would be useful to him. There may even be bribery or other form of corruption passing under the table.

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[1] See p. 537.

There are also instances in which the egotism of a supervisor or employee is the controlling factor. The first case we heard from this morning, Mr. Hipple, I think illustrates that. You have a police supervisor or chief who may not be incompetent. That is, he may do his job well, but he does not brook any particular interference with his methods, and he is very cruel in accomplishing his particular objectives.

Well, I will not go into all the illustrations that I might, but the point is that we believe that this situation, unfortunately, does not exist within Government in isolated instances but exists widely. Therefore, it is important that the role played by whistleblowers be made effective in order to achieve important Governmental objectives and cause Will Rogers to amend his statement, if he were to come back to life.

The second thing I wanted to stress is why covert retaliation is so effective under our present system of laws and rules and why a reform bill must confront the true problems. It is human nature to deny it when an individual is accused of mismanagement, of mismanaging a drug study, of abusing his authority and so forth. It is a pretty rare human being who will say, well, on further thought, you are right, I am wrong; let's do something about this.

The usual reaction is quite the opposite, to cover up the facts if they are embarrassing, and to seek to get rid of the individual who is the accuser.

Senator PRYOR. I liked your description, "kill the messenger." I think that is very good.

Mr. WRIGHT. That was Dr. Soeken's phraseology, which I think is very good.

Unfortunately, the rules which have been in existence for some time, are presently in existence, and will continue in existence under S. 508 if it is not amended, make it very easy for managers and supervisors to get rid of employees that they do not like. First, the rules permit the supervisor or manager to prepare an unsatisfactory performance rating to judge the performance of the individual accuser.

Now, in most systems of justice, a person who is accused of misconduct would not sit as judge of his accuser. But that is what our system has allowed for a long time. In fact, there is a presumption of regularity which has been applied in our court system, and is currently applied, and is not directly affected by S. 508, which allows the accused person's judgment to prevail—he not only can make the judgment to begin with, but it is presumed to be correct and regular.

In addition, our system regards the position of the supervisor or manager as being the only one that is official, that is, he has the "duty" of preparing a performance rating, or transferring individuals and so forth—hence it regards him as entitled to legal counsel, free of any charge to himself, because he is discharging an official duty. But the accusation against him by the whistleblower is not viewed as an official act. Consequently, the whistleblower has to pay counsel out of his own pocket.

There are other rules which I will not go into, but the fundamental system has worked to make whistleblowers victims, and it will continue to work that way unless those problems are adequately grappled with in the bill which comes out of this Committee.

We have made recommendations which are pretty bold, but they are designed to confront the underlying problems, and I will just mention very briefly some of them in relation to matters which have come up this morning. One of our recommendations is that there should be an independent investigation once charges of misconduct and mismanagement are made. We urge that the investigation not be controlled by OSC, that there should be procedures which assure that the charges of corruption, abuse of power, fraud and so forth, will be investigated by an independent investigation source and that until the investigation results are in there can be no personnel action pursued against that individual at all.

In other words, if you do not give him automatic protection against reprisal actions and also assure that his charges will be the subject of an investigation there is little protection involved. He should have a copy of the report and so forth, and if the report confirms a substantial part of his charges, then that should end any adverse personnel actions against him.

If you do not have that, you do not have a realistic system of protection.

Senator **PRYOR**. We will value your recommendations very highly.

I understand you have about a dozen ways to make this legislation stronger.

Mr. **WRIGHT**. That is correct.

Senator **PRYOR**. We look forward to reviewing those.

We have got to clear out of here in about 8 minutes, but I want to ask you a question, Mr. Wright. Do you not think that there is a presumption of being a "malcontent" against any Federal worker who blows the whistle? Automatically, there arises a presumption by the supervisor or manager that this person is a malcontent. Is this going too far? Am I correct?

Mr. **WRIGHT**. I think that presumption does arise. We have a lot of managers who view the employee as their subordinate, as someone hired by them, who works for them, and if he is criticized, then he charges the employee with being disloyal. He is a "malcontent" in the job. He has got a job, he is getting paid, and therefore he should be a supporting member of this manager's team.

And so, ipso facto, if he criticizes his superior's conduct he is a malcontent in the view of this manager.

Senator **PRYOR**. I think there are several questions that I was going to ask Mr. Wright, but I must say we are running out of time. I would like to submit these for the record, because we will value whatever you say.[1]

For example, I would like to ask some questions about the subject of arbitration. I am interested in this and I want to pursue some questions in that area, and certainly any other suggestions that you have.

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[1] See p. 236.

Mr. WRIGHT. Can I comment on that right now?

Senator PRYOR. Yes, and then I would like to turn to Dr. Soeken.

Mr. WRIGHT. Our Coalition has recommended arbitration as a means of determining the central facts in any personnel action against the whistleblower. The experience of our members has been very negative, as has been recounted by other witnesses this morning, with respect not only to the procedures of OSC, but also court and MSPB decision making.

It seems perfectly clear from the testimony this morning and from documented cases contained in articles that OSC personnel for some reason or other do seem to be more concerned with protecting the agency than with protecting the whistleblower. It is a little hard to understand that psychology, but I think—

Senator PRYOR. We may have to go to a psychologist in a moment to ask him that. If you will conclude, we must leave in about 5 minutes.

Mr. WRIGHT. Well, I certainly do not want to prevent you from hearing from Dr. Soeken. In any event, because Federal officials seem to have this built-in disposition to believe officials of agencies—they want to believe that the agency is not committing wrong—they tend to discredit the whistleblower's charges immediately. So we are forced to recommend arbitration or fact resolution by independent third parties as the only means that we can see of getting a decision maker who will not be prejudiced against the whistleblower.

Senator PRYOR. Thank you, Mr. Wright.

Dr. Soeken, what is wrong with the OSC? We have heard a lot of very serious allegations raised against this office.

Dr. SOEKEN. Well, I think that one of the things I would say is that the last Special Counsel director was too closely tied to the Administration. I am not sure about the present director because I think that she said in the Federal Times: "It is vitally important that whistleblowers not suffer any form of reprisal, important that Government officials and whistleblowers know that there will be a vigorous enforcement of that protection."

I have been in Washington since 1967, and Government officials, Committees, and employees make many promises. I think we just have to reserve judgment at least for this present Special Counsel, whether she will do anything different than the previous ones.

Senator PRYOR. Since 1978, we have had, I believe, five directors of this office.

Dr. SOEKEN. Yes, and there has been a varied effectiveness among that group. What I am worried about is what happens the next time. Maybe this one says, I am really going to bear down. Maybe the next one will not.

Let me just try to summarize quickly some of the things that I have seen. It is enough said, our study is fairly clear that it is a very sad situation. I hope that people will get copies of that to read that.

The first thing that must happen is immunity from prosecution. You have to have some kind of protection at the initial stages of the whistleblowing. This is a very serious problem that when you are going against your supervisor, and most whistleblowers do, unfortunately, tell their supervisors what they are going to blow the whistle on. Immediately that puts into effect the whole machinery of the Federal Government, including the Justice Department, the FBI, and the Inspector Generals if it is a serious allegation.

Now, you have to have some kind of immunity for protection of these people. The other thing I would like to see, these people are giving up their homes and their careers and we need some way to quickly get these whistleblowing incidents handled. They are taking years. I think we found an average of 3 years.

The Coalition Against Government Waste has suggested some form of arbitration which, if done properly, could probably take place in a short period of time. You cannot stand the stress mentally and physically if you go on for 3 years. It would drive you "crazy."

Most of these whistleblowers as our studied showed, were fairly healthy people before they blew the whistle. After they blew the whistle, they started breaking down. It is too much to ask of this group of Federal employees to get this kind of heat for something that has been built into their lives from early childhood. They are people who see right and wrong very clearly and effectively, and they want to apply this to their daily living. Why should that section of society be put through this wringer every time they speak out?

It is unfair.

Senator PRYOR. Doctor, is there a typical whistleblower out there? You may have just started describing that individual.

Dr. SOEKEN. Yes. It is my interpretation that the typical whistleblower is a person who is in the tradition of Gandhi and Martin Luther King and all of those non-violent type persons who have a set of morale values tied to universal morale codes. They are like soldiers marching forward; you can slow them down, but you cannot stop them. You need to protect them, because they exemplify the basic values that this country was built on.

They have it in their personality to do the kinds of things that have high morale values and they will apply that to their work and they will stand up for what they believe, and they will, unfortunately—I do not mean this negatively—they will martyr themselves for a cause that they feel is right.

I am talking about real whistleblowers. I am not talking about the people that the other side would say are just crazy people, malcontents or whatever. These people have been proven to have good cases.

Senator PRYOR. Let me ask this question. Would there be a typical bureaucratic response to a whistleblower's disclosure or action?

Dr. SOEKEN. Yes. The typical bureaucratic response is to form the wagons in a circle and fight off the oncoming threat. It would be like the "old boy" network, the group of people that are team players, the people that want to keep secret whatever the whistleblower is trying to bring out in the open. And so the knee-jerk reaction is, we have to do something about this person because he is exposing our program as having some very serious faults. We cannot take that because that is my job, my boss's job, and his boss's job, and up the line.

We have got to stop it quickly before everybody is stumbling like dominoes. I am sure that for most of the people who have been watching the Contra hearings, one of the biggest fears, I think, is that we will see a domino effect, and that is death to the bureaucracy. The bureaucracy does not want the whistleblower to start the dominoes falling.

Once they—the whistleblower—start it, there is fear, but my recommendation to management would be, look, you have a problem and you had better look into it. We have had a disaster in the Challenger program and in private industry you can go on and on. I can give you a laundry list of disasters.

If management does not look into the concerns of workers who are on the line and seeing the problems, if they do not look into the problems, they are heading for disaster. The sad thing is that these people are pointing out this waste, fraud and abuse, and they are supposed to be protected by the Merit Systems Protection Board which ironically protects the people that they are blowing the whistle on. It does not protect them.

That is very clear. You do not need any more evidence. You have evidence from the last umpteen years and it is time to make it tough. If managers want the responsibility—they are getting paid high salaries, they want the responsibility to manage—then why cannot we ask them to manage more effectively when it comes to people who are trying to speak out.

And do not be afraid of whistleblowers. I mean, let the chips fall where they may.

Senator **PRYOR**. I think it is fascinating. Well, not fascinating. I think it is sad that a statute passed by the 96th Congress is so difficult for Federal employees to comply with.

This is an instruction to Government workers: "Seek to find and employ more efficient and economical ways of getting tasks accomplished; expose corruption wherever discovered; to uphold these principles, ever conscious of public office and public trust."

That is basically a mandate for Federal employees. So the Federal employee goes out and attempts to follow the law of the land and gets his head chopped off. We have seen that today.

Dr. **SOEKEN**. Let me say one more thing about the present seriousness of this problem.

I am recommending to all whistleblowers who come to me for assistance, that if they have lost their jobs as the result of whistleblowing to immediately apply for Worker's Compensation. Under the Worker's Compensation laws, if you are injured on the job psychologically by something that your supervisor does, you have an open door to the Worker's Compensation system.

The other thing that I would recommend that this Subcommittee seriously consider, knowing the evidence is very clear that the whistleblower suffers a variety of mental and physical difficulties, is that there be some way in which whistleblowers can continue their health insurance. There are a lot of difficulties with this, but somehow whistleblowers have to have a continuation of their health insurance. Not only do you chop their heads off, but you let them bleed to death.

You have to figure out a way to stop the bleeding after they have been attacked. It is just a terrible waste of some very good people, and we have to find ways to not only protect future whistleblowers, but the ones that have already been attacked. I cannot counsel all of these people for free, and unfortunately there is not a well-developed system to pick up on the problems and help whistleblowers return to productive service.

I have gone into why that is so in other publications, but it is a problem. We have all kinds of ways to tell people to go out and speak their minds, but we have very few ways for them to be protected and to be healed after they have been damaged, especially if they do not have any money. If they have money, if they are independently wealthy, fine. Perhaps, they could sell their houses. In fact, I have a case right now where a man has just sold his house this week in order to go to court.

Senator PRYOR. He is a Federal employee?

Dr. SOEKEN. Yes. I will give you his name afterwards, if you want it. And I have a case also where the whistleblower went to prison.

Senator PRYOR. Well, Dr. Soeken, I want to thank you and Mr. Wright.

Mr. Wright, I would just say a word about Dr. Soeken. He does not know that I know this, but he has postponed his vacation to testify here today and we are very grateful.

I know that there are a lot of people very grateful for the testimony that has been given and the courage it has taken to provide this testimony this morning.

To all of our witnesses and all the staff who have helped to prepare this hearing, we are very grateful. We do look forward to your input as we move to marking up another version, or even a stronger version of S. 508.

With that, we will declare the meeting adjourned.

[Whereupon, at 1:09 p.m., the Subcommittee adjourned subject to the call of the Chair.]

WHISTLEBLOWER PROTECTION ACT OF 1987

FRIDAY, JULY 31, 1987

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL SERVICES,
POST OFFICE, AND CIVIL SERVICE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in room SD-342, Dirksen Senate Office Building, Hon. David Pryor, Chairman of the Subcommittee, presiding.

Present: Senators Pryor, Stevens, and Levin.

Also present: Senator Grassley.

OPENING STATEMENT OF SENATOR PRYOR

Senator PRYOR. Good morning ladies and gentlemen. The Subcommittee will come to order. I would like to welcome all of the witnesses this morning who will be appearing before the Subcommittee.

Last week this Subcommittee heard testimony from several individuals who experienced harassment after they blew the whistle on fraud and waste in our Government. In effect, they took a stand against what they thought was wrong and they were punished for doing so.

All of those witnesses we heard from had dealings with the agency Congress created to protect them, the Office of the Special Counsel. Each witness had a horror story to tell and none had kind words for the treatment they received. Indeed, some of the witnesses claimed that the Office of the Special Counsel set out to discredit them or to weaken their case.

Clearly, not all of the whistleblowers who go to the OSC are unhappy with the results. However, far too many have complained about the lack of adequate protection for me to believe that the horrible cases we heard about last week were isolated or unique.

The fact is that during the Reagan Administration the Office of the Special Counsel, the whistleblower's safe harbor, seems to have acquired a reputation for being decidedly anti-whistleblower.

Blame for that reputation should not rest primarily with the current Special Counsel, Ms. Mary Wieseman, whom we will hear from shortly. When Ms. Wieseman was appointed to the OSC last Fall, she inherited a bureaucracy with a very checkered past. Former Reagan appointees to the job have appeared more interested in burying whistleblowers than in helping them.

Her immediate predecessor, William O'Connor, had an openly disdainful attitude toward whistleblowers, whom he characterized as "malcontents" and "informers."

President Reagan's first appointee as Special Counsel, Alex Kozinski, also had little empathy for whistleblowers. After being confirmed, Mr. Kozinski reportedly set about ridding the office of the pro-whistleblower staff. It was telling that a high-ranking member of the Special Counsel staff filed a grievance for reprisals taken against her by Mr. Kozinski, and won.

Some who watch the OSC closely suggest that Ms. Wieseman is trying to change the Special Counsel's image. If that is so, I applaud her. However, while she should not be forced to defend the actions of her predecessors, she certainly must assume the burden of proving not only that she has good intentions but also that she has taken aggressive and effective actions to establish a new course at the OSC and new standards of conduct that reflect fairness and impartiality toward the whistleblowers.

This is an important point, because the whistleblowers at our hearing last week reported that whistleblowers are still receiving shabby treatment from the OSC. That can only mean two things, which are not necessarily mutually exclusive: either good intentions are being circumvented by inefficiency or neglect, or the system created by Congress is weak and faulty and is in desperate need of overhaul.

The Special Counsel's testimony identifies several areas of the system's statutory framework that need improvement. Senator Levin's bill, S. 508, and many of our witnesses have identified many other shortcomings in the system and have offered suggestions on how to fix it.

This Subcommittee is going to find ways to strengthen the protections given those who have the courage to stand up against waste, fraud and abuse. In fact, I am going to repeat that statement one more time. This Subcommittee is going to find ways to strengthen the protections given those who have the courage to stand up against waste, fraud and abuse. Clearly, those protections are not today adequate.

We are here to continue the process of developing legislation to achieve this goal, and we will work with all interested parties who have reasonable and productive ideas.

Our first witness this morning is Mr. Thomas Devine. Mr. Devine is the Legal Director of the Government Accountability Project, a legal foundation dedicated to helping whistleblowers. Attorneys in Mr. Devine's group represent whistleblowers before the Office of the Special Counsel and the MSPB daily. I understand that the Government Accountability Project currently is swamped with calls for help from whistleblowers all across America.

Mr. Loebe Julie will be our second witness. He is no stranger. He is the President of a group he started called the Coalition to Stop Government Waste. Mr. Julie's group also works with a number of whistleblowers across the United States.

We ask these two witnesses, Mr. Devine and Mr. Julie, to take the stand at this time.

I would ask each of our witnesses to hold your prepared remarks to 8 to 10 minutes, and we will place your full text in the body of the record.

Mr. Devine.

TESTIMONY OF THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT;[1] AND LOEBE JULIE, PRESIDENT, COALITION TO STOP GOVERNMENT WASTE[2]

Mr. DEVINE. Thank you. My name is Thomas Devine and I am the Legal Director of the Government Accountability Project, a non-profit, non-partisan whistleblowers support organization.

Particularly thanks, also, are due to the Senate's lead sponsors for the Whistleblower Protection Act—Senator Levin and Senator Grassley—and their staffs, whose tireless dedication to freedom of speech has completely won the respect of our organization.

Your hearings could not be more timely. As recent testimony by Colonel North, Admiral Poindexter, and Secretary Shultz revealed, our Nation faces a serious threat from secret Government: an elite group of bureaucrats who decide when the Congress and the public is entitled to know the truth and who do not even share with the President the difference between fact and fiction.

I think a highly significant factor in the Irangate crisis is that it took a disgruntled middle-eastern arms trader and a Lebanese journalist to expose it. Why did not any of the Federal employees who had to know about this illegal foreign policy blow the whistle? The answer is that they have been gagged, and the Administration largely has succeeded in silencing the civil service system.

Recently, GAP received a lesson in how the Administration is functionally eliminating freedom of speech in the Executive Branch. Our client, Ernie Fitzgerald, whom we believe is the most effective public servant to fight military fraud over the last two decades, was informed that he and his partner will lose their security clearance unless they sign something called "Standard Form 189."

This is an open-ended gag order in which employees have to choose between their jobs and sacrificing their rights under the Constitution and the whistleblower provisions of civil service law. The roots of this gag are from the National Security Council, the same branch in the secret Government that disclosed sensitive information to our enemies but refused it to Congress.

The Information Security and Oversight Office which monitors implementation estimates that 2 million out of 3 million eligible Federal employees have signed this form. The new orders raise questions as to whether the Administration's response to Irangate may include intensifying the level of repression in the Executive Branch.

What have these civil servants agreed to? There are several major points that this Committee should be aware of. In terms of obligations, the contract first forbids the employee from disclosing to any unauthorized person, quote, "classifiable information," which by its terms can include, arguably, anything. Even declassified information is not safe to disclose under Pentagon regulations giving broad discretion to reclassify it.

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[1] See p. 242 for Mr. Devine's prepared statement.

[2] See p. 341 for Mr. Julie's prepared statement.

This open-ended gag cancels out nearly all statutory whistleblower protection provisions.

Second, the form fails to define who is "authorized" to receive classified or classifiable information, which raises questions about the status of Congress. The answer is chilling. The Administration has explained that while members of Congress and their staffs are cleared, they are not authorized to receive classified information directly. First, the employee must submit to agency screening and clearance.

This means Congress cannot receive sensitive information unless the agency first knows and approves. This would eliminate 5 USC 7211, which protects the right to communicate with Congress. Under recently published regulations—2 days ago they were sent to the Federal Register—Congressional personnel also could be required to sign SF 189.

Third, the form holds employees liable for indirect unauthorized disclosures, which also could eliminate the flow of information to Congress. The new regulations require an intent to make an indirect unauthorized disclosure, but unquestionably there will be a chilling effect if whistleblowers are subject to criminal indictment and trial on their motives for communicating with Congress.

SF 189 is one of the bureaucratic nuts and bolts to implement any drive for secret Government, and if the program works its ultimate impact will be to dry up the flow of significant information to this body by outlawing it without prior review, and we submit that flow is the lifeblood of Government accountability.

Why have 2 million employees sacrificed their rights? They were forced to. In fact, Air Force regulations warn that mere, "reluctance to sign an SF 189 will be considered a lack of personal commitment to protect classified information."

The Administration has argued that this form is legal because it implements an Executive Order, but it is at best a derivative of a derivative of an Executive Order, and Congress has found that that is not enough, as the American Law Division of the Congressional Research Service just confirmed. In fact, the American Law Division concluded it would be in contrast to and derogation of the intended results of the whistleblowers statute if the nondisclosure agreement has a chilling effect.

We believe that unless SF 189 is rescinded, its terms may go beyond the chilling effect against which the American Law Division warned. The text for even the clarified gag order has the potential to create a free speech ice age. It has no place in a free society or in the merit system.

If SF 189 is one of the nuts and bolts for secret Government, the Office of Special Counsel has been the sledge hammer. Since the 1981 staff purge, the Office has deteriorated into a Big Brother in the Orwellian sense—the Administration's most effective weapon to identify wounded dissenters and finish off their careers, to the point of serving as a resource to blacklist rejected reprisals victims who come for help.

Its striking characteristic has been its role in creating secret law. The ASC is a highly political prosecutor's office that ferociously defends the secrecy of its operations. As a result, the bottom line is that the bases for Special Counsel decisions, which have been against whistleblowers in over 99 percent of the cases, are unverifiable.

The agency does not even recognize an obligation to explain to affected employees how the Office operates. When I inquired last summer on behalf of a client, the OSC investigator replied it was "none of [my] damn business" how the Office operated as it determined my client's rights. The OSC's prosecutive division which decides whether to litigate almost never sees the human beings whose testimony provides the facts in the case.

In short, seeking help at the Special Counsel requires submitting to secret proceedings and a secret record, all in order to obtain a decision from faceless bureaucrats the victim never meets, who refuse to disclose the facts or explain their reasons and will go to court rather than release the investigative file under the FOIA.

Whistleblowers risk their careers to fight secret betrayals of public trust. They deserve a better structure than this when they try to defend themselves.

Now, our organization and others had hopes that Ms. Wieseman's arrival would restore commitment to the Office's lawful mission, and she has introduced two welcome improvements—first, personal courtesy by herself; and second, helping a handful of Federal employees out of the more than 1,000 who sought assistance last year.

But a few token oases will not solve the free speech Saharan Desert in the Executive Branch. On pages 10-12 of my testimony I have discussed 10 examples of OSC illegality reported to GAP by frustrated whistleblowers. One in particular must be discussed. The Office is consistently refusing to apply 12 years of first amendment law. The test is whether whistleblower firings would have taken place in the absence of protected dissent. The Office only looks to see if they could have taken place; that is if the whistleblower were vulnerable.

Senators, everyone has some skeletons in their closet if the Government snoops hard enough. This theory helps to explain why the Special Counsel's resources go into investigating the whistleblower. That is the theory under which they apply this law, but it is not the theory of the Constitution.

I would also warn you to beware of fairy tale statistics. I understand that in the Special Counsel's testimony today they will tell you they are only aware of two people who have won their case after being turned down by that Office. Well, maybe they do not want to know who these folks are. I personally am aware of five and I certainly do not have a very good hold on the thousands of people who tried elsewhere.

In the newspaper this week, the Special Counsel said they have taken 32 corrective actions in the last year. We called and asked them what they meant by that and they said, well, that means that they and the agency agreed the reprisal was solved. What about the whistleblower? They are not part of the formula.

In most of the above instances complainants were upset that the Office did not take their cases seriously. They may have been the lucky ones. The OSC's response to Mr. John Berter is a microcosm, particularly because Ms. Wieseman describes it as a, "thorough and objective search for the truth." She said: "It was one of the most extended and intensive investigations we have ever done."

In other words, it represents the state of the art there.

Senator **Pryor**. Mr. Devine, we have a situation this morning where the members of the Majority—I do not know about the Minority—are going to go in to a private session I believe, at 10:30, and we may have to make some of our statements a little shorter than anticipated. I apologize, but I know Senator Levin is going to that caucus.

If you could wrap up in about 30 seconds, we will put your full statement in the record.

Mr. **Devine**. I appreciate that, Senator.

Senator, we have provided evidence to the Committee detailing 25 ways that the Special Counsel has covered up the *Berter* case and the charges against him, that they have investigated him instead of his charges of reprisal. They are summarized in our testimony.

We believe that whistleblowers are the living histories who keep our Government honest. But just as documents have been shredded to eliminate the truth, the current system is shredding the careers of these honest patriots and is silencing the civil service system in the process.

We pledge to work with this Subcommittee until the silence is broken.

Senator **Pryor**. We thank you, and once again, your full statement will be entered into the record.

Our distinguished Ranking Minority Member of the Subcommittee, Senator Stevens, has joined us, and I would like to call on Senator Stevens for a statement.

OPENING STATEMENT OF SENATOR STEVENS

Senator **Stevens**. Thank you, Mr. Chairman. I would like to ask you to put my opening statement in the record. I had to go to another meeting before this one.

There is no question that there is change that has to be brought about in our system to make certain that we get all the information that we need, but I think we have to look at the system itself right now and determine what changes we have to make in the system to see whether employees and agencies who are really using the systems we have created are free to have a full and complete exchange of information within the agencies and to the Congress.

As one of my staff has pointed out, we have come a long way. When I was growing up, people—my parents and others—used to tell me it was not right to tattle, we should not have tattlers in our society. This is a concept that we have been raised with, and I think we are coming to realize that sometimes people who want to pass on information are not necessarily trying to disturb the system, but they are trying to improve it.

We have to find ways to make certain that happens and at the same time protect our system of classified information. There is one addendum I would make to the statement I have made I just cannot quite agree with Mr. Devine that Congress cannot get information. I have been here 19 years and I have been in the military system of the Congressional oversight for 17 years and I can assure you I have gotten the information I wanted to get.

I think these Members of the Senate know, and the Department of Defense knows that when we go after information, those of us who are in that system of oversight get the information we want. We go where we want to go, and we talk to the people we want to talk to.

It may be that there are people who want to disclose classified information contrary to the procedures that we have set up that you are speaking of, Mr. Devine, but from my point of view we have to be very sure that what we are doing is setting up a system that the users can find a way to get the proper information to the people who ought to have it without getting into the point of ruining our classification system.

The recent disclosures we have had in terms of the number of problems of people who had access to information and who turned it over to the Soviets I think demonstrates that point. It is a very fine line between taking information to someone who will in turn disclose that to the great harm of our country, and taking it and turning it over to someone who in fact will do immediate harm to our country, as in the case of the disclosure of the information about our submarine system.

Now, I want to work with the Chairman, and he knows that I do and I support what he is doing. This is what this statement says that you are putting in the record, but I think some of us have to continually raise the flag of caution in terms of scrapping the system that we have until we are certain that the new suggestions will work better.

[Senator Stevens prepared statement follows:]

PREPARED STATEMENT OF SENATOR STEVENS

Mr. Chairman, I'm pleased to be here this morning for the second day of hearings on S. 508. I was in Alaska at the time of the first hearing. I know that Senator Levin and his staff worked very hard last session to study concerns that have been raised about the adequacy of the protections provided in the law to those employees who make protected disclosures and to draft the bill we are addressing today. I also want to commend you Senator Pryor for your willingness to give the bill the in-depth consideration that it deserves, as evidenced by these 2 days of hearings.

Mr. Chairman, this subcommittee has heard testimony from whistleblowers who believe that the systems created by the Congress in the Civil Service Reform Act have not adequately provided them protection from reprisal because of their disclosures. We also know that there are success stories which I understand will be entered into the record today by the Office of Special Counsel. The primary concern of S. 508 is to provide protection to the whistleblower, but it also addresses all personnel actions—major or minor by definition—where an employee alleges a prohibited personnel practice has taken place. The bill makes significant changes to the operation of the Office of Special Counsel and the Merit Systems Protection Board and it will indirectly affect the Federal Labor Relations Authority, the Equal Employment Opportunity Commission, and ultimately the courts—not to mention the agencys and employees who are the major users of the systems.

The current avenues of appeal for various personnel actions are complex and in many cases duplicative. It's no wonder employees and agencys become frustrated in their attempts to work their way through the processes. The effectiveness of these various systems have not been reviewed in depth since their creation in 1979. So, while I agree that we need to address whistleblower protection, before we make some of the changes in S. 508, I think we need to look a little further at how the appeal systems in general are working. How do they interact? Where are they duplicative? What do the employees and agencies who are the major users of the systems have to say about the effects of the changes in the bill? Finally and most importantly, will the changes help the whistleblower or aggrieved employees in the final analysis or will it possibly put them in the courts to wait on already over crowded dockets without a different result?

I would like to make one final point Mr. Chairman. We've got to look beyond the "protectors" of the merit system to deal with the problems experienced by whistleblowers. We are dealing with a mind set that can only be changed by you and I as individuals, by heads of agencys, by supervisors, by the press and by the whistleblowers themselves. When we were growing up we quickly learned that "tattle telling" got us in trouble with our brothers and sisters, our parents, and our playmates. More often than not it resulted in reprisal—our playmates looked for someone else to play with and our parents told us it wasn't nice to tattle. That carried over into our society in much more harmful ways. For example, women who complained about sexual harassment were looked at as troublemakers. Now, we're much more enlightended as parents. We encourage our children to tell us when something is wrong and we are beginning to change our attitudes about others who are willing to speak out against wrongs. The Federal Government is no different. We have to make changes in the perception of what whistleblowing is all about. We can't just look at how OSC or MSPB handles cases, but we also have to evaluate the environment in the agencys. Have agency heads on down to the first line supervisors fostered an environment where employees are encouraged to identify problems, with the expectation that those disclosures will be treated honestly, without reprisal? How well are the Inspector Generals fulfilling their responsibilities?

Finally, Mr. Chairman, we have a very delicate balancing act inherent in the CSRA. We must protect employees from prohibited personnel practices, but we must also be sure in doing so that agencys will still be able to effectively deal with legitimate discipline and performance problems.

Mr. DEVINE. Senator, I absolutely agree with you, and that is why we are very concerned that the rules of the game for the last 19 years are being changed drastically to cut off the flow of information to Congress. That is the fine print of the regulation sent to the Federal Register on Wednesday.

Senator STEVENS. I understand that you have entered into the record questions that were asked by Mr. Fitzgerald of General Watts, and my staff has given me the response that was filed yesterday to those questions. If you still have those attached to your statement, I would like to include in the record at the appropriate place the response that General Watts has furnished to us to the questions asked by Mr. Fitzgerald.[1]

Senator PRYOR. Without objection.

Thank you, Senator Stevens. Let me take time to discuss this also, because the issue of Ernie Fitzgerald has been raised this morning, and he is probably known as Mr. Whistleblower. That is what I call him, anyway.

You noted, Mr. Devine, that on July 1 I asked the Air Force to suspend the use of the SF 189 form to allow public and Congressional comment about the effects of the SF 189 form.

Well, this morning—only this morning—I received an answer from the Air Force refusing to suspend. I am most concerned about this denial to suspend the regulation in the Air Force. I think the immediate effect will be that Mr. Fitzgerald and many others, or some others, are now going to be told to sign or lose their security clearance next week.

I assume that this is the same correspondence that Senator Stevens has, and we will place that in the record.

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[1] See p. 298.

Now, the author of S. 508, the subject of our hearings today, the man who has pioneered all of this since his first day in the Senate, Senator Carl Levin of Michigan.

We look forward to your statement, Senator Levin.

Senator **Levin**. Thank you, Mr. Chairman. I do not have an opening statement today, but some of my sentiments were in last week's hearing.

I am afraid that I am going to have to leave you for a few minutes, and I hate to do that, Mr. Chairman. As you indicated, I have to go to the Democratic Caucus.

I hate to do that because of the importance of today's hearing, but I do want to thank you again for the time that you and Senator Stevens and others are putting into this subject of trying to improve the protection of whistleblowers. We hope this bill is at least a starting point for that important discussion.

I want to welcome all of today's witnesses, the ones who are here now and the ones who will appear later, and thank them for their contribution to our efforts.

Senator **Pryor**. Thank you, Senator Levin.

One or two quick questions for Mr. Devine. Last week we heard testimony from Mr. Harold Hipple. Are you familiar with this case that emanated from, I believe, Cincinnati, Ohio?

Mr. **Devine**. Yes, sir. We represent Mr. Hipple.

Senator **Pryor**. That was at the Cincinnati Veterans' Medical Center.

In your testimony, you state that OSC has not interviewed any of the victims of Chief Wilson's brutality. Do you mean that they have not taken affidavits or that they have not even spoken with the victims thus far?

Mr. **Devine**. That is absolutely correct. They have also told us that the testimony of these people they have not met is not credible. We are very disappointed that they have not sought testimony.

Senator **Pryor**. Has OSC given you any reason why no affidavits nor interviews with the victims have taken place?

Mr. **Devine**. Well, they gave us conflicting reasons. First, they said it was because the FBI had talked to those victims. Later we learned that the OSC rejected the credibility of the FBI report which contained extensive evidence supporting the charges.

Now, the Special Counsel is saying it is because the victims are all ex-criminals or drug addicts and therefore their testimony is not credible and they, for some reason, do not have the right to describe beatings that occurred against them because of this.

Senator **Pryor**. Have they given you a response in writing as to why no interviews nor affidavits have been obtained?

Mr. **Devine**. There has been almost nothing in writing that is available to the people affected by this case. That is one of our gripes, that there is no accountability, there is no record that the Special Counsel can be pinned to.

That is why we are going out and getting affidavits from witnesses who denounce the oral versions that the OSC has been passing along to Congress.

Senator **Pryor**. Well, I applaud you for doing this.

Senator Stevens, do you have questions, or Senator Levin, of Mr. Devine.

Senator **Levin**. I do have a few.

Senator **Stevens**. You go ahead.

Senator **Pryor**. Senator Levin?

Senator **Levin**. Just a few questions, if I could, of Mr. Devine. Would you abolish the OSC?

Mr. **Devine**. Yes, sir. I think we are throwing good money after bad in funding that office. They told us yesterday there has not been a need to have a hearing to restore whistleblowers' jobs since 1979. I just do not think it makes good sense to spend $4 million a year on an agency that thinks they do not need to conduct hearings on behalf of reprisal victims.

Senator **Levin**. What would you replace it with?

Mr. **Devine**. I would replace it with a private right of action through a credible forum providing due process rights. One approach to that could be through arbitrations, which is a relatively informal, inexpensive approach. This has worked well in practice.

Another is the model of the racial discrimination laws in this country that requires you to first try the administrative process and if you do not get a speedy decision, then you can go to District Court like any other American.

Senator **Levin**. In that second alternative, would there be something in lieu of the OSC in that administrative process?

Mr. **Devine**. We would not propose that. There are models in our system where administrative agencies that do not have the power to litigate do initial screening of cases. I think part of the institutional pressures that have hampered the Special Counsel is trying to trim their caseload and docket because they will be responsible to pursue the hearing for anyone that they support.

Senator **Levin**. Are you familiar with the Coalition to Stop Government Waste's proposal—Mr. Julie's organization's proposal?

Mr. **Devine**. Yes, sir.

Senator **Levin**. Have you taken a position on that proposal?

Mr. **Devine**. I agree in principle with most of the ideas that Mr. Julie has supported. In some cases we have different avenues to implement some of them, but we basically agree on the problems and the need for solutions.

Senator **Levin**. Thank you, Mr. Chairman.

Senator **Pryor**. I have two other questions, Mr. Devine, that I will submit to you in writing and would look forward to your response in writing.[1]

Senator Stevens, do you have any questions for Mr. Devine?

Senator **Stevens**. No. In the interest of time, I do not have any questions.

Senator **Pryor**. Fine. Mr. Loebe Julie, we look forward to your statement.

Mr. Julie, we would like to ask you to try to hold it to 8 minutes, and I will have to bang the gavel down at that time because we are in a time crunch this morning.

Mr. **Julie**. I will do so. I would like to thank the Subcommittee for inviting us to testify.

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[1] See p. 331.

I would like to say that in view of the small time that we have available, I will leave to Tom Devine's testimony an idea of the detailed problems that whistleblowers have had with the OSC and take a more philosophical view of the same problem.

But I do want to start out by saying that we think that as the members of the Senate have said, this is a serious problem. History shows us that the last time it was looked at was 9 years ago, and what we do now with this legislation will either reward and protect whistleblowers for the next 9 years or condemn them to 9 more years of misery.

My committee sees whistleblowers from a broad perspective as the people who obey Congress' code of ethics and expose corruption wherever discovered. We think that that gives this bill a very broad constituency, because the constituency for a good bill is not just the whistleblower, it is also every honest Government employee who wants to obey the Government code of ethics, and it is also every taxpayer and every voter who wants to see waste, fraud, and abuse in the Government curbed.

Just in case there is any belief that there is not any substantial amount of waste, fraud and abuse remaining in Government, the estimate that we have made is at least $60 billion in procurement waste. An estimate that the Federal Government has made is up to 10 percent of the total Federal budget goes to waste, fraud and abuse, and that would be over $100 billion.

The first line of defense against that waste is not a committee like mine or a Committee like yours, but the whistleblower, the honest Government employee who takes the Congressional code of ethics seriously. If that battle against waste, fraud and abuse is to be won, it has to be won with the help of those honest Government employees.

Our feeling about the present legislation is that with the addition of two constructive features—and I would like to concentrate on just constructive features—the present legislation will do what we want it to do, and that is, protect those employees.

One is to provide access to another means of dispute resolution than the Office of Special Counsel. Tom Devine has mentioned arbitration, which was the only method of dispute resolution we have been able to find that is practical for the honest employee. The reason for that is that, as we stated in our statement, access to courts—which has been proposed as an alternative to using OSC MSPB channels—cost whistleblowers $20,000 to $500,000.

An employee, particularly if he has been harassed, demoted or fired, is not in a position to pay those costs, and that closes off courts as a remedy for the employee. We have all heard and seen the documentation of the criticism of the Office of Special Council and the Merit Systems Protection Board. We feel that Congress has proved by its scrutiny of many other bureaus of the Government that were originally created to be watchdogs of the Government, Congress has found that in fact they turn out to be the exact opposite of watchdogs.

Senator Levin and Congressman Sikorski recently had occasion to criticize the Office of Government Ethics because it has failed to do its part as a watchdog. I think Congressman Sikorski's language summed it up succinctly. He said that instead of being a watchdog, the Office of Government Ethics had turned into a toothless terrier on valium.

I would say that if we look at the OSC/MSPB performance for whistleblowers, they have protected whistleblowers as well as a toothless terrier on valium. The fact is—and we stated it as a basic certainty—you cannot take a captive office of the bureaucracy and expect it to be a watchdog over that same bureaucracy. It has not worked in the past. It will not work in the future. It is like asking the left hand of an organization to attack the right hand.

That leaves very little. If we cannot use a captive organization and if the courts are too expensive, we are really stuck. Fortunately, many decades ago arbitration came into use as a practical means of dispute resolution. In my statement I set forth that to handle all of the whistleblower cases that are necessary to cover fraud, waste and abuse in the Federal Government requires a very large organization. The Inspectors General reported 11,000 allegations of waste, fraud and abuse in a 6-month period, and that adds up to thousands and thousands of cases per year.

In recommending arbitration, we pointed out that the arbitration organization would have to be an organization of national size with offices throughout the country, with a large panel of arbitrators, and with at least part of that panel serving on a pro bono basis.

There are organizations that fit that description and the idea behind choosing that kind of an organization is to have an organization big enough to do the job quickly and efficiently and also independent enough to be free of Government influence.

In my statement I propose something besides arbitration. Our present legislation is completely topsy-turvy when it comes to protecting whistleblowers and it is topsy-turvy in this sense. We first, in the code of ethics, invite the whistleblower to expose corruption.

Senator PRYOR. Mr. Julie, I hate to interrupt but in about 60 more seconds I am going to ask you to include the balance of your statement in the record.

Mr. JULIE. All right. Let me finish then by saying that instead of protecting the whistleblower's job immediately from the time he makes that exposure, we allow the system to punish him, and then we let him play a game of trying to undo the punishment. The immunity provision that I put forth in the statement shows that that would not be necessary if we incorporated it in the bill.

Thank you.

Senator PRYOR. The work that you have done over the past years, Mr. Julie, has been not only very educational and detailed but also very constructive. This entire Subcommittee applauds you for those efforts.

I remember the first time that I had the privilege of hearing you testify, I believe that you had tried to get your message across to Congress about how the Department of Defense was dealing with the small businessman. To illustrate this, literally, you had published a comic book, a very famous comic book, around the halls of Congress for a good while. Maybe we need to do that again.

But this is not a comedy. It is a serious problem, and I think you know that.

Mr. JULIE. That is correct.

Senator PRYOR. Senator Stevens?

Senator **Stevens**. I thank you, too, and I want to look at some of the suggestions that you made. I would like to remind my colleagues that thunder and leaks come from the left as well as from the right. There are possibly people who disagree with the current Administration and want to come forward with information that would be counter to the policies the Administration wants to follow.

I found the same thing occurred when there was an Administration headed by a different President. Then the thunder and leaks came from the other side of the spectrum. So we have to keep in mind that whatever we do has to be balanced and be fair and not just reward those who want to be involved in undermining the current system.

The other thing I would just remark to you, we had a hearing and some exchange on the question of the Office of Government Ethics. I think it is important to remember the employee protection that is involved in a Government Ethics disclosure. No one else discloses, and that system did not work, primarily, because of the failure to do the immediate task of reviewing the disclosure to determine whether or not it was sufficient.

The whistleblower in that case disclosed the information without having notified the employee that the agency did not feel the disclosure was sufficient, contrary to the law. And that was an employee protection mechanism that in the instance involved failed because of an immediate lack of compliance with the law. I think at times we are inclined to forget what is built into these laws for the protection of the people who were compelled to disclose a portion of their lives, that the disclosure mechanism does not apply to the public at large.

I think we have to be a little bit more insistent upon compliance with the basic law itself as far as these procedures are concerned. It is going to be very important if we follow your suggestion of protecting the individual who is the whistleblower from the inception.

As a district attorney I can tell you, many cases that we finally took to trial were first brought to the attention of the authorities by one of the people involved in the criminal activity who came forward trying to protect him or herself while in the process knowing full well that the exposure was about ready to come.

The system ought not to give that person an immunity simply because the person was the first one to the authority. I think you would agree with that, and the immunity suggestion you have made has to be read in relationship to the ultimate guilt of the person involved.

Mr. **Julie**. Senator, I fully agree, first with your statement about what happens under different Administrations. Waste, fraud and abuse is fully bipartisan. That is one thing we have learned. The protection of the honest whistleblower, which is what our provisions are for—the deserving whistleblower—are provided under the scenario that I spelled out in a two-page appendix.

The dishonest whistleblower that you referred to does not gain from that scenario. He gains about a 50-day delay in whatever personnel action is pending against him, or should be pending against him. That is negligible compared to the remainder of the merit system and civil service delays, but it does permit us to protect the good whistleblowers and it really does not help the bad one for more than 50 days.

One of the basic principles of our system of justice, I believe, is that it is better to let nine guilty ones go free than punish one innocent one. Our present system, in effect, does the following. It says it is better to punish nine innocent ones to get one guilty one. And under the scenario I propose, we will protect the nine innocent ones and the guilty one will only go free for 50 days.

Senator STEVENS. Well, I want to work with you on that.

Thank you, Mr. Chairman.

Senator PRYOR. Thank you, Senator Stevens, and Mr. Julie, thank you. I have three or four questions, Mr. Julie, that I would like to submit to you in writing.[1] We will keep the record open so that you and Mr. Devine and possibly other witnesses will have a chance to respond in order to build a complete and total record of this hearing.

Let me also announce to my friend and colleague, Senator Stevens, and so the record will show, the Department of Justice requested an opportunity to come forward and testify at this morning's hearing. Late yesterday afternoon, about 5 o'clock, the Department of Justice called and decided that they would not appear. So they will not be testifying this morning.

The Office of Personnel Management [OPM] also, about two weeks ago, requested that they be able to appear at the second hearing. On Monday OPM called our staff and said that they had decided not to appear at this hearing.

Senator Grassley, I apologize to you.

Senator GRASSLEY. I just got here.

Senator PRYOR. You snuck in. I do apologize to Senator Grassley, who has been very, very active in this issue of whistleblowing.

Senator Grassley, we would love to call on you for a statement or to question the witness.

Senator GRASSLEY. I have no opening statement. I do appreciate your inviting me here to testify. I want to state what I said a couple of weeks ago: I want to work with you on improving S. 508.

I do not have any questions for Mr. Julie, but I would like to ask two questions of Mr. Devine.

Senator PRYOR. Certainly.

Senator GRASSLEY. Thank you.

In your testimony, you raised a point that I would like to pursue. I would like to ask you a question about SF 189, but would like to preface it with another question.

In disciplinary action cases against superiors who allegedly retaliate against whistleblowers, how easy or difficult is it for whistleblowers to prove retaliation?

Mr. DEVINE. Senator, it is virtually impossible for whistleblowers to prove reprisal in disciplinary cases. They do not have the right to fight back legally and seek accountability for those who retaliate. Only the Office of Special Counsel can file an Administrative complaint. Whistleblowers are at the mercy of whether the Special Counsel wants to prosecute.

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[1] See p. 350.

Whistleblowers have been deprived of the opportunity that all other American citizens have to file suit in court for constitutional torts. As Mr. Fitzgerald has pointed out, even convicted felons have that right.

Senator GRASSLEY. So, practically impossible?

Mr. DEVINE. It is definitionally impossible under current law.

Senator GRASSLEY. Okay. To what extent would SF 189 increase, decrease, or be neutral with respect to that burden?

Mr. DEVINE. SF 189 goes a frightening step further. It does not provide due process for whistleblowers to defend themselves against revocation of their security clearance. There is nothing in the form or the implementing regulations going with it that provides a whistleblower an opportunity to challenge the propriety of the decision to classify or not classify the information. That has to be done separately and in the meantime they are out of a job.

This significantly cuts into Federal employees' due process rights.

Senator GRASSLEY. So, in other words, with SF 189 superiors might have an official way to retaliate against a whistleblower if that superior desired to?

Mr. DEVINE. That is correct. Under this system, the whistleblowers cannot independently defend themselves on the merits, and as with all forms of reprisal, they cannot fight back, either. That means they are bound and gagged, not just gagged.

Senator GRASSLEY. I understand that the Administration is indicating that it may eliminate the word "classifiable" from SF 189. If that is done, in your view what becomes the net effect of SF 189?

Mr. DEVINE. If that occurs, with some exceptions that form would simply be a waste of paper. We already have adequate laws to protect against classified information disclosures that are improper, and we prosecute those people, and we should.

Senator GRASSLEY. So then SF 189 would be superfluous?

Mr. DEVINE. It would be useless if it stopped being ominous.

Senator GRASSLEY. Thank you, Mr. Devine.

Mr. Chairman, I am done.

Senator STEVENS. Mr. Chairman, I was not going to ask any more questions, but I must tell you, I certainly disagree with your last statement concerning the effectiveness of other laws to prevent disclosure of classified information.

What laws are you talking about?

Mr. DEVINE. Well, Senator, this question came up quite extensively in 1983 and 1984 and because the Administration could not make the case for this type of order at the time, General Stillwell of the Administration promised that we would not have one. Without any new Congressional hearings or showing of need, SF 189 has quietly been implemented.

I agree with you in one of the very important statements you made: Before we change the status quo we should fully discover the facts that provide the need for structural changes, and that certainly should be done before rushing through with this particular form.

Senator STEVENS. Well, I know of no effective law on the books today that prevents the disclosure of classified information. I want you to understand, I have agreed with Senator Grassley and Senator Levin and others about the need to protect whistleblowers, but the contrary is also true. There is also a need, still, to protect the public against unauthorized disclosure of classified information.

Mr. DEVINE. Senator, I do not think that anyone would disagree that we need the strongest possible sanctions to protect classified information. Certainly our organization would be cheering on efforts to responsibly strengthen the criminal statutes that defend State secrets.

We are concerned about agreements to sign away rights that this Congress created to blow the whistle on fraud, waste or abuse that could be, in some situations, classifiable but has no prior restraint on its disclosure built into our current system of checks and balances.

Senator STEVENS. I think we are in basic agreement. I look forward, as I said, to working with both of you to try to work out that balance.

Mr. DEVINE. Thank you, sir.

Senator GRASSLEY. And let me express that I sure appreciate what Senator Stevens just said, because if we can zero in on the laws that are needed to protect classified information, we need to zero in there and not try to accomplish something through the back door that inhibits what is a very useful function of Government to protect, that of whistleblowers.

If we are going to maintain integrity in Government, we cannot punish those people who have integrity.

Senator STEVENS (presiding). Thank you very much, gentlemen.

The Chairman has asked me to call Ms. Wieseman, the Special Counsel for the Office of the Special Counsel.

I think if he were here he would give you the same statement, that we would like to have you make your statement in 8 minutes, and we will try to move on so he can get on to his other meeting.

TESTIMONY OF MARY WIESEMAN, SPECIAL COUNSEL, OFFICE OF SPECIAL COUNSEL [1]

Ms. WIESEMAN. I will certainly do my best, Senator Stevens.

I want to thank the Subcommittee for the opportunity to address you today on the subject of whistleblower protection in general and S. 508 in particular.

I have now been Special Counsel for almost 11 months, since September 5, 1986. I have succeeded to the position in a period of some of the most intensive controversy the Office has known.

That is both positive and negative. It is positive in the sense that the resulting debate may give rise to constructive proposals that will enhance protection for genuine whistleblowers. It is negative in the sense that much of the criticism of the Office of Special Counsel in the present controversy is dated, misinformed or outright misleading, and simplistic in its definition of some of the questions in issue—as evidenced by testimony at these hearings last week and this morning.

Nothing could be further from the truth about the OSC as I know it in my nearly 11 months as Special Counsel than much of what has been said so far in these hearings. I must reject any notion that the OSC under my tenure must share a large part of the responsibility for any reluctance on the part of Federal employees to disclose fraud, waste and abuse. I must also reject any characterization of the OSC under my tenure as an organization that just does not care.

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[1] See p. 356 for Ms. Wieseman's prepared statement.

Since I became Special Counsel, the OSC sought relief on behalf of nine Federal employee whistleblowers, and in less than 10 months we have obtained relief for six of them—more, I daresay, than the Government Accountability Project or any equivalent organization has in the same period of time. Further, in two of the three remaining cases sent to agencies for remedial action so far, I expect favorable results for the whistleblowers in the very near future.

The relief that we have already achieved since September ranges from cancellation of removals and a position abolishment, reinstatement, withdrawal of a geographic reassignment, retroactive promotion, rescission of a reprimand, back pay amounting to tens of thousands of dollars, and expunction of adverse information in employee personnel records. I describe the six whistleblowers who have benefitted from OSC's efforts under my tenure in more detail in my formal statement, and I commend their stories to your and the public's attention.

The Subcommittee and the public at large should also know that in the first 10 months of my term, the OSC initiated corrective action in 32 cases, and we have won relief on behalf of at least 29 Federal employees so far—significantly more actions than in any one year since at least 1981. Despite what I believe to be an auspicious beginning to my term as Special Counsel, and the growing realization of my ambitions for the Office, the OSC has been subjected—unfairly, in my view—to a continuing and escalating barrage of virulent and strident attacks on its commitment, its professionalism, and worst of all, its basic integrity. Broad-based attacks against the Office about complaints dating back to 1980 continue to be made and applied uncritically to the OSC of today. Activities and statements by my predecessors continue to be used in characterizing the OSC of today. Orchestrated campaigns are waged to prejudge and publicly discredit our investigations before they are completed and the results are known.

It is small wonder that employees are said to be apprehensive about coming forward.

For reasons that I cannot fully comprehend or accept, interested Congressional Committees and the press—with the exception of the *Federal Times*—have refused our requests to speak with, and to provide complainants who have been helped by, the OSC with a forum akin to complainants who disagree when we must conclude that we are unable to obtain relief for them under the law. The hearings last week produced people who were willing to say the most extreme and negative things in an apparent attempt to do as much damage to our credibility as possible. As the General Accounting Office reported in 1985, part of the perceptual problems experienced by the Office result from the fact that the Congress and the press generally only hear from disappointed complainants who do not qualify for relief from the OSC. This is expected. But I must question the basic fairness of providing a forum for such individuals, to the exclusion of individuals who would dispute those negative assessments based upon their own first-hand experience with the OSC.

No one with the Subcommittee to my knowledge has spoken to Tess Miragias, Whistleblower Number 3 in my formal statement. No one in the press—other than the *Federal Times*—has been willing to report OSC's success in achieving corrective action for her, although protestations of innocence by the reprisor in her case were carried by newspapers in the area of the country where it occurred.

I want to take this opportunity to let Tess Miragias speak for the record of this hearing, so to speak, in the form of an unsolicited letter that she recently sent to me.

She wrote: "This letter is to express my sincere appreciation to you and the Office of Special Counsel for favorable conclusion of my complaint with final corrective action. I wish to commend, in particular, two individuals on your staff, Attorney David Cortes and Investigator Paul Crovato, for their diligence, dedication and tireless efforts on my behalf. Their loyalty and dedication to duty is outstanding and you should have a sense of real pride in their accomplishments.

"I also wish to convey my personal thanks to these individuals for their high degree of professionalism and the competence displayed in their communications with me and other HUD staff members during the course of this legal action.

"May all of your subsequent efforts on behalf of Federal employees victimized by prohibited personnel practices be as successful." Signed, Tess Miragias.

I am providing a copy of this letter to the Subcommittee and I respectfully request that it be included in the record of these hearings.[1]

Senator PRYOR. It will be included at the appropriate place.

Ms. WIESEMAN. Thank you, Mr. Chairman.

No one, either from the Subcommittee or the press, to my knowledge, has responded to expressions of willingness to speak about his experience with the OSC by former Regional Customs Commissioner, William Griffin, whistleblower number four in my formal statement. A fuller profile of Mr. Griffin's case and the assistance rendered to him by the OSC in the form of stays and cancellation of his proposed termination by the Customs Service is being provided to the Subcommittee. I request that it too be included in the hearings of this record.[2]

Senator PRYOR. Without objection.

Ms. WIESEMAN. I want to take this opportunity, too, to correct the record of last week's hearings about one of the investigators on the OSC staff, Patricia Stone. Joseph Whitson, one of the witnesses, described the OSC, including Ms. Stone, as a "false hope."

There are five individuals in Minnesota today who refute that charge more eloquently than I could. These gentlemen came to our office after their geographical reassignments were ordered, based

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[1] See p. 388.

[2] See p. 389.

upon their belief that they had been targeted for reassignment based upon their age. The eldest of these gentlemen was 72 years old. Ms. Stone's investigations disclosed significant discrepancies in the rationale offered by the responsible agency managers and led to the agency's recent decision to cancel all five reassignments. They wrote to me last week by happy coincidence, as follows:

> We are pleased to report that a favorable resolution has been reached in our complaint of age discrimination. The prompt and firm action taken by the Office of Special Counsel was critical to achieving a withdrawal of the adverse action taken by our agency, the U.S. Geological Survey.
>
> We especially commend the efforts of Patricia A. Stone, principal investigator in our case. Her professionalism and unrelenting effort to solve this issue are worthy of the highest praise. During the course of the investigation we gained much confidence knowing that Ms. Stone was pursuing the case well beyond the scope of a normal 9-to-5 workday. Even when most of Washington, D.C., was snowbound, Ms. Stone continued her work, making her appointments with officials and working by telephone from her home when travel was not possible. There were times during the course of the investigation when knowledge that the Office of Special Counsel was pursuing the case was our only source of optimism because all other avenues of recourse seemed to be of no avail. It was Ms. ~~Stone's~~ professional and tireless endeavor that inspired confidence in us and gave us hope when there was no hope left to sustain us. Ms. Stone exemplifies the very highest standards of Federal service.
>
> The fine work accomplished by your Office has restored our confidence at a time when honesty and integrity appear to be lacking in some Federal agencies and has demonstrated that protection of employee rights can be achieved. Sincerely, Signed Joseph Hess, Paul Felshein, Kurt Gunard, Charles Smith and G.A. Payne.

A copy of this letter is also being provided to the Subcommittee and I request it be included in the record of these hearings.[1]

Senator PRYOR. It will be put in the record.

Ms. WIESEMAN. Thank you, Mr. Chairman.

In the short time alloted here I want to address myself to some of the more egregious misrepresentations about the OSC and its work made by previous witnesses at these hearings and others. First, several witnesses have charged, with no supporting details whatsoever, that the OSC "funneled" information back to the agencies for use in building a case against them. In my experience, this is categorically untrue. This charge is one of several spurious or misleading allegations that have been made repeatedly by GAP, which knows or should know, based on recent experience, that the charge is without foundation.

For example, in connection with our current intensive investigation of the reprisal allegations by four police officers at the Veterans Administration Medical Center in Cincinnati, Ohio, complainant John Berter appealed his removal for poor performance and AWOL to the Merit Systems Protection Board. Following months of intensive OSC investigation, the VA requested our entire file in the Berter matter for use in the agency's case in support of his removal. We refused. The VA obtained an MSPB subpoena for our records. We told the VA that we would oppose compliance with the subpoena, and proceeded to prepare motion papers seeking to quash it.

While this was in process, Joseph Kennedy of GAP called to inquire as to what our Office intended to do in response to VA's demand for our file. He was informed that we were moving to quash the subpoena. Action on our motion was mooted when we were informed that GAP had withdrawn from legal representation of Mr. Berter, and that he had withdrawn his appeal to the MSPB less than a week before the scheduled hearing in May.

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[1] See p. 390.

Incidentally, with that action, Mr. Berter gave up his existing individual right of action for redress of unjustified or illegal personnel actions. The MSPB hearing would have provided an opportunity for a full hearing and resolution of the issues involved in the OSC investigation. Nevertheless, the OSC is currently analyzing a massive investigative file to determine if Mr. Berter and the other complainants were the victims of reprisal for whistleblowing.

With respect to that inquiry, I must say that recent charges by GAP that the OSC is engaged in a "coverup" of police misconduct at the VA Medical Center are nothing short of preposterous. I have no difficulty telling this Subcommittee that I can understand that the public's reaction is likely to be one of alarm and concern when presented with the renditions of facts at the VA Medical Center that have been widely circulated to the press to date.

Nevertheless, an escalating barrage of charges has attempted to lay the responsibility for correcting any abuses at the doorstep of the OSC, and to fault it for not having done so. The proponents of these attacks entirely misperceive the respective authorities and responsibilities of the OSC and the other cognizant agencies. Those agencies with the statutory responsibility for prosecuting, disciplining and correcting any police misconduct—and that is not the OSC—have been involved in the case.

The Department of Justice reviewed the matter for possible criminal violations of law and concluded that the evidence did not support Federal criminal prosecution. It is within the purview of the Veterans Administration to inquire into the matter for violations of administrative rules and procedures, including standards of conduct violations, and to take any administrative action that may be warranted. The OSC and the VA Office of Inspector General have cooperated in the investigation arising out of the allegations of excessive force by police personnel at the Medical Center for our respective purposes—that is, for purposes within our respective jurisdictions. The OSC has investigated for purposes of attempting to determine whether the complainants were reprised against for reasonably believed disclosures of misconduct, and the VA Office of Inspector General is concerned with the issue of whether the misconduct occurred, and if so, what should be done about it. In fact, we have provided the VA Office of Inspector General with all of our investigative data on that issue adduced to date to assist them and the VA in making that determination.

The OSC at present is now actively reviewing and analyzing voluminous quantities of data in an effort to determine whether we can prove that actions taken against the complainants were done so in reprisal rather than on independent grounds of misconduct or poor performance. I am at a loss to understand how anyone can conclude, before the investigation is completed and without access to all of the evidence being accumulated by the OSC, that we have failed to carry out our responsibility—not to mention the responsibility of other agencies.

Now I want to address some of the other statements that were made to you at least week's hearings. Lawrence T. Reid's testimony, for example, was replete with errors and omissions. First, he testified that it required 6 months of painstaking effort before the OSC intake officer finally decided that his case warranted a "rarely utilized," as he stated, field investigation. I would not characterize 200 field investigations a year to be a rare utilization of that activity. Second, Mr. Reid exaggerated by 3 full months the length of time between receipt of his complaint—on January 22, 1986—and referral for investigation—on April 22, 1986. Third, he testified that the OSC required him to prepare a detailed legal brief for OSC attorneys. The OSC investigator firmly denies that he ever required Reid or his attorney to submit a legal brief, or that he made the other remarks attributed to him—he merely requested that they forward documents mentioned by them in an initial interview.

As to the substance of Mr. Reid's complaint to the OSC, the case failed not only because there were serious questions about when and to whom he made any disclosures of fraud, waste or abuse—Mr. Reid's own accounts varied somewhat—but because the evidence was so strong of apparently valid, supervening causes for the agency's actions, by independent entities outside Reid's command, with little or no involvement by the subject of his complaint.

Prior to these hearings, Mr. Reid requested the OSC to reconsider the decision to close his case, and we will do so. I do not want to compromise that process by venturing any forecast of its outcome. I will say that even if it can be shown that he made disclosures before December of 1983 or January of 1984, other conduct related to what he himself described in a January 1984 memorandum as a year-long series of problems regarding the adequacy and accuracy of his travel vouchers and the independent inquiries and actions of the Naval Training Center, the Naval Investigative Service, and the Naval Intelligence Command and others involved in his suspension and other actions, will pose serious obstacles to proving that the actions were a reprisal, rather than a response to other problems with his conduct.

Joseph Whitson testified about an alleged string of broken appointments without advance notice by OSC investigators, including Patricia Stone, the subject of the letter that I read to you earlier. Clearly, there is at least a theoretical possibility that unavoidable circumstances—travel delays or missed messages, et cetera—may result in a situation where an investigator cannot contact a witness before breaking an appointment. But to the best of my Office's ability to reconstruct the events of Mr. Whitson's case in 1985, there is no evidence that what he described occurred by Investigator Stone or anyone else. For my part, I certainly would not condone any conscious disregard of the basic amenity of apprising a witness in advance, to the extent possible, that an appointment cannot be kept. It is true that several individuals dealt with Mr. Whitson during his case—the complaints examiner, two investigators, and one of their supervisors. Given limited staff resources and the amount of extensive travel required, the complexity of cases, staff turnover and other considerations, it should not be surprising that on occasion, witnesses will come into contact with more than one investigator in a given case.

Following receipt of the Whitson complaint on or about August 23, 1984, he was contacted by an investigator assigned to the preliminary processing of his complaint in the Complaints Examining Unit on or about September 18, 1984. The case was initially sent for investigation to the Dallas field office in November of 1984 where it was assigned for investigation.

In January of 1985, the case was reassigned to the Washington, D.C., office, to take advantage of investigative expertise suited to the issues involved in the case.

Mr. Whitson alleged that he was told by Investigator Williams that the case had been transferred from Dallas to Washington because of its, "political sensitivity." Mr. Williams categorically denies that claim. Cases are sometimes transferred from one location to another or handled by different investigators for one of a number of possible reasons—including adjustment of workload to permit more expeditious investigation of a case, access to investigator expertise in a given area, timelier or more efficient pursuit of leads—but never, in my experience because they are politically sensitive.

Mr. Whitson was in phone contact with Ms. Stone and her supervisor on several occasions between January and August of 1985. Also during that period, Ms. Stone had received regular correspondence with documents sent by him, and other documentary evidence relevant to his case had been gathered. Mr. Whitson alleged that on the occasion of his visit to our D.C. office in August of 1985, Ms. Stone's comments revealed that she knew little, or anything, about his case. Curiously, in May of 1985 Mr. Whitson sent documents to Ms. Stone and wrote: "I know now from our conversations how understaffed your office is. I do appreciate the time that you are devoting to this matter."

Harold Hipple, another of last week's witnesses, told you that the OSC did not interview him until September of 1986. In fact, Mr. Hipple was interviewed by telephone in July of 1986, before another interview in September. Mr. Hipple also was incorrect in telling the Subcommittee about the circumstances surrounding 2 polygraph examinations administered to him. Mr. Hipple's allegation that another officer at the VA was told by Vincent Russell of the OSC staff to resign his position and that the OSC would then be in a position to help him, is also an egregious misrepresentation. Not only did Mr. Russell not tell him to do so, it would make no sense for an employee of the OSC to do so——

Senator **Pryor**. Ms. Wieseman, pardon me. Let me first apologize to you. I know that in the previous hearing a lot of allegations were made about OSC and you are here to answer some of those allegations.

We do have a time problem. I would like to ask you, if you would, to let us submit your full statement for the record.

Also, in the interest of time, Senator Grassley must be present at another briefing in a few moments. We are going to allow him, if you would permit, the opportunity to ask you the first series of questions.

Is that all right with you?

Ms. **Wieseman**. That will be fine.

Senator **Pryor**. Senator Grassley.

Senator **Grassley**. Thank you very much, Mr. Chairman.

Let me apologize to the Subcommittee for the deference to my time schedule. I appreciate it very much.

Thank you, too, Ms. Wieseman.

You have said in your testimony that in the last 10 months you have received about 176 whistleblower complaints. I think it is obvious that that is a low number considering the millions of Federal employees, and that this evidence makes it debatable whether we have a whistleblower protection problem at all.

I would like to raise this issue from a 1984 study. This study was conducted by the Merit Systems Protection Board, which surveyed Federal workers and found that nearly 70 percent of those who know of fraud or improprieties would not report what they knew about fraud or impropriety, and they believe that no corrections would result, and that their number one reason for non-reporting is the fear of reprisal.

In light of that evidence, is it possible that the relatively low number of complaints your Office receives stems at least partially from a fear or feeling of helplessness among whistleblowers?

Ms. **Wieseman**. Well, Senator, I disagree with the conclusions that have been expounded from that study. I do not believe it stands for the proposition that people are afraid, number one, to come forward because of reprisals. I think, as stated in the report, that the number one reason was that they felt nothing would happen to correct the problem.

Senator **Grassley**. Yes.

Ms. **Wieseman**. In any case, we have analyzed that report and the analysis was submitted for the record in a House hearing last year and I would like the opportunity to submit that analysis for the record in this hearing, of what we believe that MSPB study does in fact show.[1]

On the broader question, however, Senator, as I said in my statement, literally tens of thousands of disclosures are made every year by Federal employees. We list the number of Inspector General audits, of GAO audits, of fraud hotlines, of GAO hotlines. That is not to mention—these are documented disclosures—not to mention the day-to-day activity and interaction between the Inspectors General and the employees in their agencies.

The employees in the agencies and their communications with Inspectors General are the lifeblood of an Inspector General's activity. They must rely on the employees to give them accurate and complete information. So in that context, Senator, with those literally tens of thousands of disclosures being made every year in the Federal Government, I think—and my point was in my testimony—that when we receive only 179 allegations of reprisals for whistleblowing, the question is, how big is this problem we are dealing with?

I think that it is significant, and my experience as an Inspector General confirms—and this Committee should realize—that disclosures take place every day and the numbers of reported reprisals are very small. As I said, that might be the surprising fact in a civil service of some 3.1 million employees.

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[1] See p. 391.

Senator GRASSLEY. Well, I think our office—every office on the Hill, probably—gets a vast number of calls from people who feel that the system just is not working.

In your testimony, you say——

Ms. WIESEMAN. May I say, Senator, and I want to state very strongly, any reprisal for whistleblowing should not be tolerated and will not be tolerated. To the extent that our Office has the legal tools and the law and the facts, we will vigorously pursue—we have and we do vigorously pursue—any reprisal for whistleblowing.

I do not mean to denigrate the seriousness of reprisals when in fact it occurs.

Senator GRASSLEY. In your testimony you say that there is no contradiction between protection of whistleblowers and protection of the system. You also say that the protection of whistleblower employees is already a primary mission of your office.

Are you saying then that a statutory designation that the Office is to primarily protect whistleblowers would have no effect, which is one of the major purposes of the legislation?

Ms. WIESEMAN. Certainly, Senator, I am not saying it would not have any effect. I am saying it is already a primary mission of my Office. It has been stated to be a primary mission of my Office. A concurrent primary mission of the Office is to protect, not the system, but the merit system. There is no conflict at all that I can see between protecting Federal employees from prohibited personnel practices—which is the higest priority—and protecting the merit system. Not any other system, the merit system.

Senator GRASSLEY. Well, let's say I will not take exception to what you say is the primary purpose stated in regulation or policy or however it is stated. Are you saying that Congress stating that in the legislation as the primary purpose would have no effect?

Ms. WIESEMAN. I think the way our Office operates currently, Senator, I think it would be redundant. It is, in fact, the case, and I do not see any conflict between the two purposes and I have no problem in so assuring this Committee, or with legislation that would say it is the primary purpose of the Office, because it is the primary purpose of the Office.

Senator GRASSLEY. I suppose that my part in this legislation is to bring high visibility as well as clearer Congressional intent for the Office of the Special Counsel, and I suppose I see the problem this way: People in the Administration see a whistleblower like a germ in the body. The whistleblower is somehow seen as a threat to the smooth functioning of that body. So the entire immune system descends upon that germ and snuffs it out.

Do you think that individuals within the Executive Branch view whistleblowers as somewhat of a germ within the system?

Ms. WIESEMAN. I certainly think some of them do. We brought disciplinary actions against a number of supervisors who did just that. They did everything in their power to assure that the whistleblower would be off the Government payroll. We believe that that certainly does occur. Our record of accomplishments for whistleblowers shows that when it does occur—when we can prove it occurs—we will take action to correct it.

Senator **Grassley**. Well, is this response to whistleblowers you just described an unconscious and involuntary function of some employees towards whistleblowers or the system?

Ms. **Wieseman**. I do not think it is unconscious, Senator. In the cases we have seen, there was a conscious choice to get rid of the person who was causing the trouble. I think it is not unconscious. I think that excuses what I consider reprehensible conduct. They do it consciously, when it occurs.

Senator **Grassley**. Well, out of all due respect, I think when I see how the Office of Special Counsel has worked, and not without the good intent of everybody that has functioned as Special Counsel, including yourself, it seems to me like the Executive Branch sees whistleblowers as a threat to its own smooth functioning, snuffing out those people. Somehow we have not responded to the needs of the whistleblowers the way we should and we have chilled the environment. That is just my view.

I would like to refer to the *Spanton* case as an example. About 3 years ago while many in Congress were calling to abolish the Office of Special Counsel, I defended the Office because of what I thought was a diligent interest on the part of your Office to champion the case of George Spanton and others.

The background of George Spanton is that he was a DCAA auditor who alleged that a major defense contractor billed the Government improperly to the tune of about $150 million. For this, you know, he got what a lot of people get—he was forced to retire, and he was one of the most, I think, thorough and industrious Government employees that I have had a chance to meet.

I say that primarily from the extreme documentation that he gave to us. He drove up here from Florida to testify before a Committee that I was chairing at that time, with a station wagon full of boxes as justification for what he had found. After Spanton won the initial decision in his case, the decision was appealed, and for the many months between that first decision and the appeal process, the Office of Special Counsel touted the *Spanton* case as the supreme achievement of its existence up to that point and as a reason why the Office should not be abolished, as evidence that happy days were here to stay for Government whistleblowers. Then a year later Spanton lost his case.

Now, in the view of many of us who were watching that case, the reason why the Special Counsel lost is because it did not recognize the fact that Spanton's enemies—and there were many—were acting in concert, as is usually the case when the Administration is out to devour whistleblowers.

It seems that when the Government investigates circumstances within its own domain—and that is sure what is involved with your Office in investigating the complaints that come to you—that those somehow perpetrating the misdeeds are never found to have acted in concert, even though common sense would indicate otherwise. As long as the correct forms are filled out, the system can snuff out a whistleblower. You simply subdivide all the acts and never look at the whole.

It seems to me that this shortcoming is reason enough to warrant the passage of this legislation and that is why I am part of the effort to strengthen the Office, because we have to take the employee's best interest in mind, and this legislation would provide additional recourse for an employee outside of this administrative system where they would get more of an impartial review of their case.

That would only be if they felt that they did not get that impartial review within the administrative process. But it seems to me if we are going to encourage whistleblowing, we have to provide access to that process outside the system, if the person needs it, and I think the George Spanton case is the perfect example of that.

I just make that statement so you know where I am coming from.

Senator **Pryor**. Thank you, Senator Grassley. Senator Stevens?

Senator **Stevens**. I thank you. I think you have done an excellent job in administering your Office and that you have every reason to come forward and set the record straight, as you have.

I do think, however, there is still a problem about the adequacy of the law. We are all concerned about that, as to whether you have the total assurance in the law that what you seek to do is authorized by Congress and you have all the tools that you need.

I noticed you put some limitations on whether or not you have the total legal framework for what you seek to do, so I want to urge you to ask your people to help us to make certain that this basic framework of law gives you the ability to provide this protection to those who try to improve our system by coming forward.

At the same time, however, I have to add my own comment that my own background experience in some of these matters indicates that all the Captain Queegs of the world are not in Captain's uniforms, you know. We do have those who pose as whistleblowers, too.

As Members of Congress, we have them coming into our offices everyday. You should see some of the memoranda that I get about people who have insisted that when I formed the Post Office, I did not do it right, you know. Literally. I mean, they think I did it.

Now, the impact of people who have some mental problems, I think, in terms of this system have to be taken into account, too. I noticed that in some of your comments you have wisely separated those people out.

I think that we have to give you better tools, however, and I hope you will work with us in that regard.

Ms. **Wieseman**. Senator, I appreciate your comments and we have made some suggestions in our statement for the record of possibilities for enhancing protection for whistleblowers. We want to be part of that process. We want to be part of the solution. We do not want to be viewed as the problem—I do not believe we are the problem—but we definitely do not want to be viewed as the problem and we want to work with the Committee to assure that whistleblowers obtain enhanced protection, the protection that they deserve under our system.

Senator **Stevens**. Thank you.

Senator **Pryor**. Thank you, Senator Stevens.

Ms. Wieseman, in another capacity and wearing another hat, I have been doing some oversight hearings on the Internal Revenue Service. I have received, I guess, 4,000 or 5,000 letters and maybe that many phone calls from every State in the union about the Internal Revenue Service, most of them bad. In fact, I do not think I have heard any favorable calls.

Now, my point is this. I get calls from people who just do not want to pay any taxes period. They do not believe in taxes. But the great, great bulk of those calls, I think, are from honest, good Americans with good intentions, not wanting to defraud the Government, but simply wanting to pay their fair share.

I am going on the assumption in the case of your Office that most of the people who call your Office or write your Office are seeking advice and seeking a way to make our system better, make our tax dollars go further, make us see whether or not we in our time can make this experiment of self-Government work.

I just wish that you had been appointed to this job about 7 or 8 years ago. I hope you are not coming in too late. You have been here, I believe, 11 months.

Ms. **Wieseman**. Eleven months, yes, sir.

Senator **Pryor**. During that 11 months, in how many cases do you know of have disciplinary actions been filed against supervisors for reprisals?

Ms. **Wieseman**. How many actions our Office has filed against supervisors?

Senator **Pryor**. Yes.

Ms. **Wieseman**. We have one currently pending. I think we had another disciplinary action—I know we had another one—I believe two—there have been two disciplinary actions filed, or three, since I have been there.

Senator **Pryor**. How many allegations of reprisals by supervisors against the whistleblower have you received?

Ms. **Wieseman**. Reprisal by the——

Senator **Pryor**. By the supervisor in an agency or bureau?

Ms. **Wieseman**. How many supervisors alleged reprisals against their supervisors?

Senator **Pryor**. No. I am sorry. How many whistleblowers are alleging reprisals against them committed by their supervisors?

Ms. **Wieseman**. Admitted by their supervisors?

Senator **Pryor**. Committed.

Ms. **Wieseman**. Committed. I am sorry.

Senator **Pryor**. Allegedly committed.

Ms. **Wieseman**. We have had 179 this year.

Senator **Pryor**. 179 basic accusations?

Ms. **Wieseman**. Complaints of reprisal for whistleblowing.

Senator **Pryor**. And then about one, or maybe two actions against supervisors?

Ms. **Wieseman**. Disciplinary actions. We have been emphasizing, Mr. Chairman, corrective action. That is, making sure the employee is made whole where the law and the facts show that there has been reprisal. That is not to say we are not pursuing disciplinary action. We are.

However, there are two cases that have been decided in the past several months by difference circuit courts of appeal—the *Starrett* case that was mentioned by Senator Grassley, and the *Harvey* case by the United States Court of Appeals for the D.C. Circuit, where findings by the Merit Systems Protection Board in cases in which we had sought disciplinary action were reversed.

We are reviewing each case and making a determination based on the law as presented in those cases as to whether a disciplinary action case can be made on the evidence. I might just mention here, Senator, one of the features of S. 508 would be to permit an appeal to all the Federal circuits, rather than confining the appeal rights from the Merit Systems Protection Board to the Federal Circuit.

We have seen in our cases that the other Federal circuits have not been kind to us in our cases. Both disciplinary action cases have been reversed. Whether a different result would occur with a new appeal process, I do not know if that would be the case or not.

Senator PRYOR. In our last hearing we did hear from four whistleblowers. You have attempted during your oral statement this morning to give your side of the story, or the agency's side of the story. I think you have done a good job.

I think our problem is that we do not know who to believe.

Ms. WIESEMAN. Well, Senator, I can only say this, that we have a process in our Office which is a rigorous process—a process of review, a process of investigation and a process of analysis to determine whether there is any action our Office can take under the law to protect the whistleblowers.

I can say this, Senator, in 1985 the General Accounting Office did a most thorough review of the Office of Special Counsel. They were in the Office for a year and a half. They reviewed the files. They found that they did not disagree with any decision made by the Office of Special Counsel not to pursue a whistleblower reprisal case—that each case that they reviewed, there was a fatal defect in the case such that action could not be taken by our Office.

That General Accounting Office report said that they found that the Office of Special Counsel gives the highest investigative priority to whistleblower reprisals and that they do not suffer from lack of investigative interest. That is an independent assessment. The General Accounting Office did that review.

With respect to the statements made at the hearing last week, I have attempted to respond to some of the specifics.

Senator PRYOR. All right. Let's talk just a little more specifically. For example you stated quite a bit to sort of discredit Mr. Hipple's testimony before the Subcommittee.

Now, do you know whether your agency ever took an affidavit, or even an interview with the alleged victims of Chief Wilson?

Ms. WIESEMAN. Yes, Your Honor. Sorry, Mr. Chairman.

Senator PRYOR. Do I look like a judge? [Laughter.]

Ms. WIESEMAN. Yes, we have.

Senator PRYOR. Were there affidavits obtained?

Ms. WIESEMAN. Let me just talk about the question of affidavits, Mr. Chairman. We have been asked this by your staffs and it has been raised as some kind of problem that in every case we do not take affidavits from witnesses. This is a normal investigative practice. The FBI never takes affidavits, as far as I know, except in national security cases, from witnesses.

As an Inspector General at the Small Business Administration, we sometimes took affidavits, we sometimes did not. There are reasons not to take affidavits, there are reasons that one would want to take affidavits.

Senator **Pryor**. Was there a reason not to take an affidavit of the alleged victims?

Ms. **Wieseman**. Well, the statements were taken of the victims that the FBI could locate and interviewed. No affidavits were taken of the witnesses.

Senator **Pryor**. You saw the FBI report?

Ms. **Wieseman**. Yes, sir.

Senator **Pryor**. You saw the interview with the victim?

Ms. **Wieseman**. Yes, sir.

Senator **Pryor**. You read the interview?

Ms. **Wieseman**. Yes. We have that documentation, all of the work that the FBI did. That forms part of what we are looking at right now to determine whether we have a case.

Senator **Pryor**. Do you think that Chief Wilson was justified in doing what he did to the individual in the VA parking lot?

Ms. **Wieseman**. Mr. Chairman, this matter is an open investigation. Part of the problem that we have had in the criticism of the Office in connection with this open investigation is that we gave what we thought was a confidential briefing on the case while it was still in progress to some Congressional staff.

That briefing was leaked to the press and forms the basis of many of these charges. The accounts of that briefing were misrepresented,- statements we said were misrepresented, and it was leaked to the press at a time when we were right in the middle of the investigation. I hate to talk about a case that is currently under investigation, under review in our Office.

Senator **Pryor**. All right. Let's move to another case that is no longer under investigation. I do not think that your testimony made reference to the testimony of one Mary Brothers, a surgeon for the Veterans Hospital in Kansas.

I told Dr. Brothers during the conclusion of her time here at the witness table that of all the witnesses I have ever heard anywhere in law practice or since I have been in the House, the Senate or as Governor, I do not know that I have ever seen a better documented case than Dr. Brothers brought. I had never seen documentation as thorough as Dr. Brothers.

Now, I do not think that you mentioned Dr. Brothers' case, did you?

Ms. **Wieseman**. Well, Dr. Brothers—the case we had in our Office was titled under another doctor——

Senator **Pryor**. Dr. McAnaw.

Ms. **Wieseman**. Dr. McAnaw, correct. This case goes back to, I think, 1981 or 1982. It was finally closed in the Office several years ago, 1984 I believe.

With respect to that investigation, we have been criticized that the case took so long to investigate. That is because—I am informed—the Office tried and tried and tried to be able to obtain the evidence to bring an action in that case.

If the Chairman is familiar with the District Court opinion in connection with the case brought by Mary McAnaw, if the Chairman is not familiar with that, we would be happy to provide a copy of that. The District Court reviewed the evidence very completely—I think it is a 70- or 80-page opinion—and found against Dr. McAnaw.

What we had in that case with respect to Dr. McAnaw was the problem of whether the VA would have taken the action—this is the standard under which we are precluded from obtaining relief. If we cannot show that the VA would not have taken that action but for the protected conduct, we lose. That is the law.

With respect to Dr. Brothers, we did investigate her allegations—or the Office did, I was not there at the time—the Office did investigate her allegations and there was a question of whether the VA was required to hire her as a staff surgeon. There were VA regulations that required that there be competition and review by a Veterans' Administration Medical Board, which had not occurred.

She was, in fact, later considered by that Board and she was not hired. So there were current regulations——

Senator **Pryor**. By the way, so the record will indicate, in all fairness to Dr. Brothers, she took her case to court and she won $200,000.

Ms. **Wieseman**. That is what I understand. I am not familiar with the record of the case. It was a jury trial and so there is no judge's opinion.

Senator **Pryor**. Yes. One or two quick questions, and then Senator Levin has questions.

You have a staff right now of 84 employees and a budget of somewhere between $4 and $5 million; how many people do you need?

Ms. **Wieseman**. Well, we are stretched very thin. There is no question about that, Mr. Chairman. I am not pleased with the time that it takes us to complete investigations. I am not happy with the time it takes us to do initial inquiries to make determinations.

Senator **Pryor**. Do you have a lot of people applying to be on the staff of the Office of Special Counsel?

Ms. **Wieseman**. Well, when we have openings and we advertise, yes, we do have people applying to be on the staff.

Senator **Pryor**. Is the morale good?

Ms. **Wieseman**. Well, I think after last week's hearing morale was affected and that is why I wanted to make the points I did, Mr. Chairman. I have a pretty thick skin, I think, but I think it is important for the staff to know that they are supported and that their good work is appreciated.

I think the reaction is only natural with the kind of attacks and personal attacks, with names of investigators and others in the Office who are unable to defend themselves being used. It is important that the record be set straight on that. I think morale is a problem, or can be a problem in situations like this.

Senator **Pryor**. How many Federal employees are under civil service? Three and a half million?

Ms. **Wieseman**. 3.1 million is the figure I have.

Senator **Pryor**. Do you think that all of these 3.1 million Federal employees are familiar with the Code of Ethics of a Government employee?

Ms. **Wieseman**. I am sure they are not, Senator. One of the things we did at SBA in the IG's office was to try to get that message out. We gave ethics briefings to as many people as would listen to us. That was one of our priorities.

Senator **Pryor**. Do you think they know, for example, that Section 9, "expose corruption wherever discovered," is a mandate to Federal employees today. Are they aware of that mandate?

Ms. **Wieseman**. Well, let me say this—and I was just relating my experience as Inspector General—I know the Inspectors General try to get that word out. That is, all of us were doing that. So I hope that it continues, but I am sure that not all the Federal employees know it.

Senator **Pryor**. Thank you. Senator Levin?

Senator **Levin**. Thank you, Mr. Chairman.

First, let me join in welcoming you, Ms. Wieseman. There has been a lot of criticism of your Office, some of which I share. But one thing is clear, and that is that your regime at the OSC has been a significant improvement over that of your predecessors and we are grateful for that in a number of ways which have already been touched on this morning.

We do appreciate the improvements which you have brought to the Office. While you will hear, and have already heard, some criticism from us, it should not cloud the fact that we are grateful for what improvements you have brought to that Office.

Ms. **Wieseman**. Thank you, Senator.

Senator **Levin**. I want to discuss one case which was mentioned last week. In a way I hate to start with specific cases, but let me just clear the air on that one.

There was a Joseph Whitson who testified here, and his testimony was awfully dramatic about the number of appointments he had with the OSC which were broken without any notice. I particularly took umbrage at the concept, if in fact it happened, that over and over and over again he gathered witnesses together who then were stood up by people in your Office. This is before you got there by the way, and so you do not have to defend your own supervision. But, nonetheless, this is what Mr. Whitson's testimony was to this Committee, and that is awfully discouraging.

The answer which has been provided to us as to what happened in that particular case is that the OSC acknowledges that the meetings did not take place; apparently, they had been scheduled, but the investigators do not recollect that any meetings were cancelled without notice.

Now, the words "do not recollect," frankly, are sensitive words around Washington these days. I am just wondering whether or not they cannot do a little better than "not recollect." I mean, this is three meetings in a row, including a trip to Washington, and I would think that you ought to ask those investigators whether their notes reflect that they gave notice to this gentleman prior to not showing up. We would appreciate your informing the Committee as to what their notes reflect on that particular issue.

Secondly, if you could just tell us whether or not anyone ever met with Mr. Whitson?

Ms. **Wieseman**. Yes, Senator. In fact, I discussed Mr. Whitson and the statements that he made concerning broken appointments.

One investigator, whom I mentioned previously in my testimony, said that she did not break appointments without notifying Mr. Whitson. In fact, I did just what you said. We saw that testimony and we said, did this happen?

That should not happen. That is not to say that it could not happen in an instance where there are mis-communications or something like that.

Senator LEVIN. We are not talking about one isolated incident. We are talking about a pattern in Mr. Whitson's case where he came and testified with dates and names, saying, I had all my witnesses together, the meeting was scheduled, the OSC investigator never showed up, and never gave me any warning that he or she was not showing up. This happened three straight times. Now, that is not an isolated incident.

Ms. WIESEMAN. The investigator who recalled—one investigator, Senator Levin, did not recall ever breaking an appointment without telling Mr. Whitson. The other investigator recalled that she did not break appointments without notifying him, and in fact——

Senator LEVIN. Well, did anybody ever meet with him?

Ms. WIESEMAN. Yes. We were in contact with Mr. Whitson, our records reflect, by telephone on an ongoing basis. He was sending documents. His case was one that included three boxes of documents which he sent regularly, which were the subject of telephone conversations between him and the investigator regularly.

Senator LEVIN. My question has to do with meetings. Meetings were scheduled and were cancelled, putting aside the question of notice; there is either no recollection or there is disagreement about whether notice was given of the cancellation.

My question is, did your people ever meet with Mr. Whitson at all?

Ms. WIESEMAN. Yes. They met with him when he came to Washington in August of 1985.

Senator LEVIN. Okay. Who was it who met with him then?

Ms. WIESEMAN. He met with Ms. Patricia Stone and Mr. Vince Russell.

Senator LEVIN. Were those the people he was supposed to meet with?

Ms. WIESEMAN. Yes, sir.

Senator LEVIN. All right. Now, let me ask you some general questions—we will get away from the specifics—about the bill which is the subject of this hearing, your comments on it, and some other general issues involving your procedures.

The statute now reads that if the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, the Special Counsel shall report the determination, together with any findings or recommendations, to the Board.

When you act on a case, do you determine whether or not there are reasonable grounds to believe that a prohibited personnel practice has occurred and then take that action to the Board, or act yourself? Or do you determine that you actually believe that a prohibited personnel practice exists before you take the matter to the Board?

Ms. **Wieseman**. Well, in corrective action cases, Senator Levin, the statute requires that before we go to the Board we are required to give the agency the finding and make a recommendation, if we wish, to the agency with respect to corrective action. Only after the agency does not agree with our recommendation for corrective action or does not take corrective action are we permitted to bring an action before the Board.

Under current practice before the Board and under practice that has been in effect, I guess, since 1981, the Board has required us, the Office of Special Counsel, to prove by a preponderance of the evidence that a prohibited personnel practice has occurred. We have to prove that in an adversary proceeding before the Board—incidentally to side track a little bit—we have not, in my tenure of 11 months, in seeking corrective action on behalf of 32 Federal employees, we have not had to take any action to the Board as of yet.

We have obtained corrective action without litigation before the Board in, I think it is, 29 cases to date. We are expecting or hoping for the corrective action in the other matters. So, we have not had to utilize the Board to enforce our corrective action recommendations.

But at the time we are making the determination whether we have sufficient evidence to show that a prohibitive personnel practice has occurred, we do make that determination, whether we have a reasonable basis to believe that we can show that a prohibited personnel practice has occurred.

Senator **Levin**. I am not sure I understand the answer to the question. You have not gone to the Board because you have settled all of your cases. That is not the issue, and that is not my question.

One of the reasons, perhaps, you have not gone to the Board is that you have used the wrong standard and you felt you could not meet the standard that you have set for yourself. The question is whether that standard is the correct standard.

My question is this: Do you require yourselves to reach a conclusion that a prohibited personnel practice took place prior to your going to the Board? Or, that there are reasonable grounds to believe that that practice took place? That is my question.

Ms. **Wieseman**. Reasonable grounds to believe that we can prove that a prohibited personnel practice occurred; that is our standard.

Senator **Levin**. So you do not require yourselves to reach the conclusion that it did take place, but only that you have a reasonable ground to show that it took place?

Ms. **Wieseman**. Able to prove that.

Senator **Levin**. Okay, to prove it. You do not require yourselves to conclude it yourselves; is that right?

Ms. **Wieseman**. No. I think if the Senator is getting at the question of are we 80 or 90 percent sure——

Senator **Levin**. No, just that you believe it yourself.

Ms. **Wieseman**. We have to assure ourselves that we have a reasonable basis for bringing an action before the Board in which we can prevail. That is our standard.

Senator **Levin**. All right. That is different from reaching the conclusion yourself that it existed; would you agree with that?

Ms. **Wieseman**. Yes. I guess it is maybe a semantic question, but I will answer yes.

Senator LEVIN. It may be a subtle difference, but would you agree it is a difference?

Ms. WIESEMAN. A prohibited personnel practice under the law, as I see it, is one we can prove under the law under the standards that the Board has set up for us. We have to take the Board's evidentiary standards and what our burdens are into account in determining whether a prohibited personnel practice has occurred.

Senator LEVIN. I understand. But do you agree there is a difference in the way I phrased those two tests or not?

Ms. WIESEMAN. I think there may be a subtle difference.

Senator LEVIN. All right. On the question of whether the prohibited practice—well, let's just talk about reprisal for a second.

If reprisal played any role in the personnel action taken against an employee, why should there not be corrective action? Even de minimis. Even a minimal role. Why should we tolerate any reprisal, even if it only played a minimal role in the personnel action?

Ms. WIESEMAN. I think there are two answers to that, Senator. First, that under the Civil Service Reform Act, that is what Congress said—that it did not want whistleblowers in a better position because of their whistleblowing than they would have been absent the whistleblowing—that is, that a personnel action adverse to that whistleblower should not occur because they blew the whistle; on the other hand, the whistleblower who for other misconduct or performance reasons would have been disciplined or removed should not be immunized by virtue of the whistleblowing.

Senator LEVIN. Well, now if the whistleblowing played a role, why do you say that is synonymous with being immunized? That is very different. No one is suggesting that people be immunized. The point here and in this legislation is whether or not we ought to tolerate reprisal being based on whistleblowing at all.

Ms. WIESEMAN. I was looking at it under current law, what the standards are and what the Congress said in the Civil Service Reform Act. As the standard is in S. 508, as it is enunciated in S. 508, in my testimony I mentioned a couple of issues with respect to that concept of an "any part" test.

I do not feel, Senator Levin—OPM and the Department of Justice have said that the Mt. Healthy standard is essential to proper personnel management. That is not my role. I am not advocating one way or another, at this point, the Mt. Healthy standard.

I will say this, that there are some questions that need to be asked in terms of the "any part" test, and that is whether whistleblowing should be accorded the highest value in Federal personnel law, higher even than discrimination, where the Mt. Healthy test does apply; whether employees who blow the whistle should be in a better position, and how that will affect the morale of other Federal employees, that is a question.

Senator LEVIN. Better position than?

Ms. WIESEMAN. Than they would have been in had they not blown the whistle.

Senator LEVIN. I do not see why that follows from the "any part" test. They are not in a better position at all.

Ms. WIESEMAN. If the agency had legitimate misconduct reasons for taking an action against someone, and at the same time the person blows the whistle—and I think the Supreme Court enunciated this in Mt. Healthy—the agency personnel may have it in their mind. There is some infection, however small, of the judgment with respect to the personnel action such that under the "any part" test that personnel action would not be permissible.

Senator LEVIN. But they are not better off because they blew the whistle. They are better off because the agency retaliated against them. And that is what we are trying to address. We are trying to prohibit and deter retaliation. So you say they are better off because they blew the whistle, and I do not see why you can reach that conclusion. It has got nothing to do with their action in blowing the whistle which protects them or immunizes them.

What immunizes them or protects them is the retaliatory response of the agency, even though it is a minimal part of the causation involved.

Ms. WIESEMAN. Well, if you look at the Mt. Healthy test, or the case itself, Senator Levin, we had—I mean, that was a school teacher whose contract was not renewed. One reason was because he wrote a letter to the local radio station, which was absolutely protected conduct, complaining about school policy. The other reason was that he cursed students. The Supreme Court said, when you have these two activities; does the fact that he engaged in protected conduct prevent the school board from taking action against him, even if they would have taken action against him because of this other misconduct. The Supreme Court said, no, he is not protected.

And that is the kind of policy judgment that I think the MSPB was applying in trying to interpret what Congress said in 1978, when they applied the Mt. Healthy test in reprisal cases.

Senator LEVIN. Would it be easier administratively for you if we adopted the "no part" test?

Ms. WIESEMAN. I think there would be more cases that we could bring. Yes, Senator, I do think there would be more cases.

Senator LEVIN. And the proof would be a lot easier?

Ms. WIESEMAN. Yes. I think proof would be easier.

Senator LEVIN. The current statutory language provides that the Special Counsel can only be removed by the President for, "inefficiency, neglect of duty, or malfeasance," rather than serving at the pleasure of the President.

Do you support that current statutory language?

Ms. WIESEMAN. I do not know whether to take that personally. I know that——

Senator LEVIN. Do you think that that is useful language?

Ms. WIESEMAN. I think independence is a very useful status. I think it can be achieved other than that way. The Inspector General Act does not have a term appointment. It is something for Congress to decide, as far as I am concerned. I think the concept of independence, no matter how it is achieved, how it is enunciated, is very important, because we are not terribly popular with the agencies either in a lot of instances. I mean, we are coming into agencies and investigating matters that maybe some people do not want investigated.

So I think independence and the ability to do our job with that independence is important.

Senator **Levin**. Well, there has been a suggestion that the language in the statute that currently exists be dropped and that you serve at the pleasure of the President. What is your reaction to that proposal?

Ms. **Wieseman**. I know the Department of Justice has taken the view that it is unconstitutional for an Executive officer not to serve at the pleasure of the President. That is a constitutional question.

Senator **Levin**. Putting aside the constitutional question, what is your reaction to the proposal on substantive grounds? Do you think it would help, in terms of independence, or hurt?

Ms. **Wieseman**. I do not think there is any need to change the current language that is in the statute.

Senator **Levin**. Okay. What is your reaction to separating your Office from the MSPB?

Ms. **Wieseman**. Senator, we are administratively and functionally separate currently. It is a good idea to actually have on paper what we are in fact doing and, in fact, we are totally separate now administratively and functionally, and to have that recognized by statute I think would be useful, also.

Senator **Levin**. So you would support that part of the bill?

Ms. **Wieseman**. Yes.

Senator **Levin**. What is your reaction to being granted litigating authority so you can defend cases that you brought before the MSPB in court?

Ms. **Wieseman**. I think the litigating authority would be useful. I would have liked—and I am sure the Special Counsels at the time would have liked—to have the authority to defend our actions in the cases that have been brought. We have subpoena authority and we need to enforce those subpoenas on occasion. I think that the independent litigating authority is one that would be useful in performing our functions.

Senator **Levin**. You suggest in your testimony that the OSC be granted the authority to order stays and corrective actions unilaterally. Do you think there is a conflict in being granted such authority at the same time that Congress is establishing your primary role as protecting employees rights?

Ms. **Wieseman**. I think that would enhance our authority. Both of those go together, I think, Senator. What we are saying is that——

Senator **Levin**. But does that not put you more in a decision making role if you are given the authority to order stays, rather than in an advocate's role?

Ms. **Wieseman**. At the time we make the determinations on stays and corrective actions—and we have had cooperation from the agencies—that there does not seem to be a need to further litigate that considered judgment. I think it would expedite and enhance the protection of employees. I believe in the Civil Service Reform Act it may have been the Administration's position initially that the Special Counsel would be ordering corrective action.

This is not a new concept, whether it was the Administration or some other proposal, it is not a new concept. While we have not had problems with Federal agencies in acceding to our recommendations, we do not think it is necessary to have to litigate that decision. I think it enhances what authorities we have, and we could expedite the process for the benefit of the Federal employee.

Senator LEVIN. Would you have to divide your staff in any way to both be the judge, in a sense, and order stays, and be the prosecutor or the litigator? Do you see any need to divide staff for that function?

Ms. WIESEMAN. I do not think so, Senator. Now, under the standards we currently have, the Board must grant us a stay if we file—almost must—for the first 15 days. After that, the standards get a bit higher. But in fact, the standards we are currently under are not that egregious that we could not meet those standards.

I do not think it is that much of a change. I think the change would be that we do not have to put on the record before the Board what our evidence is at a time in the investigation when we are not prepared and do not want to put our evidence on the record.

Senator LEVIN. My last question is this: Would you support including in the definition of "reprisal," the threat to take or not to take a certain personnel action?

Ms. WIESEMAN. Yes, I would, Senator. I think, again, that would enhance our ability to protect whistleblowers.

Senator LEVIN. Again, let me thank you for the improvements which have been made in your Office. We think there is still a ways to go and we, obviously, support a number of the reforms which are in this bill. We welcome your support for many of those reforms, as you have indicated this morning, and again, we are grateful for those improvements which we have already seen in the OCS.

Ms. WIESEMAN. Thank you, Senator. I and my staff would be happy to work with your staffs with this bill. We want to be a part of this process.

Senator LEVIN. Thank you, Mr. Chairman.

Senator PRYOR. Senator Levin, your questions as always were splendid. That series was very instructive.

Ms. Wieseman, we thank you for your answers. I am sitting here thinking about the last hearing that we had on this subject, and after listening to today's witnesses I see something is wrong. Because among the employees of the Federal Government who blow the whistle, I think there is, without question, a feeling that they are going to ultimately be on trial.

The inference that I get from your testimony is that you think that your agency is on trial. I do not know whether we are truly carrying out the spirit and letter of this whistleblower statute. Somehow or another we have got to try to get things back on track around here.

Ms. WIESEMAN. What I am concerned about, Mr. Chairman, is that the publicity and the reports that emanate from persons who are disappointed in not receiving relief from our Office, are disseminated, and that Federal employees get the wrong idea. I want Federal employees to know that we are committed to vigorously pursuing reprisals for whistleblowing cases, as well as all other prohibited personnel practices.

It worries me, and the GAO made the finding in 1985, that we need to do more to let the Federal employees know what we do and how we do it and that we are available. We are trying to do that and I want word to get out and I want Federal employees to know that we are committed to performing our function in the most professional manner possible.

That is why such adverse reports on how our Office operates, going back 5 years or more, I think is counterproductive to what we are all trying to do, and that is enhance protections for whistleblowers. That is why I want to say that what has been reported is not how our Office operates.

Senator PRYOR. I think you are trying to do your job. I hope all 84 members of your staff have that same commitment and that same dedication.

I find when I go back home most Federal employees do not have a high regard for OPM. I also think that—I do not want to say most—but many Federal employees may not have a high regard for the Office of Special Counsel.

Something is haywire here.

We appreciate your testimony this morning.

Senator Levin, do you have any further questions?

Senator LEVIN. No, other than to agree with the Chairman that we have got a long ways to go before we gain the confidence of Federal employees in this Office, but that you, Ms. Wieseman, have at least taken a few steps down that road.

I agree with the Chairman that the attitude, the feeling of confidence among Federal employees is just not there. The numbers just simply do not inspire confidence in terms of the percentage of cases that get resolved favorably, even though that has gone up since you have taken office.

The number of cases which go to the Board, obviously, are not there. The numbers do not do it. Your attitude, I think, is, again, an improvement over that of your predecessors, to put it bluntly. You would not say some of the things that your predecessors have said, such as do not stick your head up and blow the whistle because you are liable to get it blown off.

I think your statement would be very different: Stick your head out there and we will do our damndest to protect you. I think you would say that and believe it. But there is a ways to go before the Federal employee really has confidence in the OSC because of a lot of reasons, including a lot of history which cannot be just washed away in 11 months.

I think it is also going to take some reform in the statute to do it.

Senator PRYOR. This Subcommittee, of course, is challenged with the obligation of oversight. We enact legislation and then look to see if that legislation actually is hitting the mark, or if it is not hitting the mark, how we have to improve it. That is what Senators Levin, Grassley, Stevens and this Subcommittee are trying to assess.

I guess the only people who have oversight over Senator Levin and myself would be every 6 years when the voters in Michigan and Arkansas weighin. They may not think very highly of us.

Senator LEVIN. They may blow the whistle on us.

Senator PRYOR. We are trying to get 51 percent of them, anyway.

We really have a challenge, and we have got to turn it into an opportunity to disseminate what your Office does, the role it plays, the function it can serve.

Maybe together, working in a constructive way, we will find those answers.

Ms. **Wieseman**. I certainly wish to work with the Committee and I think that we can enhance protections. We have some ideas about it and we would be more than happy. We are anxious to work with the Committee.

Senator **Pryor**. We thank you for your appearance this morning.

Ms. **Wieseman**. Thank you.

Senator **Pryor**. Our final witness is Llewellyn M. Fischer, General Counsel of the Merit Systems Protection Board.

Mr. Fischer, we welcome you. If you would be so kind as to hold your statement to no more than 8 minutes, we will have your full statement appearing in the printed record.

TESTIMONY OF LLEWELLYN M. FISCHER, GENERAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD [1]

Mr. **Fischer**. Thank you Mr. Chairman.

I am happy to say that I am going to assist you in meeting your tight schedule. I have only a very few remarks to make.

I would like to say that the Merit Systems Protection Board strongly endorses the principle of protecting whistleblowers from reprisal. Now, our role is somewhat different than, certainly, Ms. Weiseman's in that we act in the manner of an administrative court. We adjudicate the claims, the appeals that are brought to us, and in view of that function, we think it would be inappropriate to take a position on this bill.

However, I would like to point out a few of the practical effects that the legislation would have on our operations.

Number one, the legislation substantially expands the scope of jurisdiction, the kinds of employees that can come to the Board on appeal. It also expands the kinds of actions that can be appealed to the Board, and in light of those two forms of expansion of our jurisdiction, would certainly increase our workload.

There is another interesting feature that has to do with the effect of this legislation on the equal employment opportunity complaint process. As the bill is fashioned now, it appears to allow a dual exercise of a discrimination complaint: One, the route of the prohibited personnel practice to the Special Counsel and to the Board, and the other through the equal employment opportunity complaint process in the agency, and ultimately to the Equal Employment Opportunity Commission.

We do appreciate and we have noted with approval that this version of the legislation, in contrast to H.R. 25, eliminates the 60-day time limit that the Board would have in deciding these appeals. We like that feature, and we also like the feature about the person who has an allegation going to the Special Counsel initially and exhausting that avenue before he or she comes to the Board.

We think that is a useful provision because it recognizes the appropriate investigative role of the Special Counsel and would also build a record that we could use on the appeal. As to the independent right of appeal to the Board that is granted by Section 1221, the silence—the provisions are silent as to the nature of this type of proceeding before the Board.

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[1] See p. 425 for Mr. Fischer's prepared statement.

Given that silence on that question, we think we could flesh it out in regulation. It is unclear to our mind at this point whether or not the corrective action envisions a two-tiered appeal process as is usual with the present appellate procedure.

There is one other provision that we think deserves some comment in terms of the practical impact, and that is the right granted an appellant to go to the regional courts of appeal, as an option in addition to the Federal circuit, and we think that granting this right would complicate the establishment of a coherent body of personnel law.

With that, that concludes my observations. I would be happy to answer any questions you might have.

Senator **Pryor**. Thank you, Mr. Fischer, for your statement. Your full statement will be included in the record.

Earlier witnesses have suggested that whistleblowers be provided an option to enter into binding arbitration in lieu of the OSC or MSPB procedures. Now, what advantages or disadvantages do you see in this proposition?

Mr. **Fischer**. Well, it is not clear to me that arbitration would be a cheaper avenue for the affected employee to use in the appeal. I was listening to Mr. Devine and Mr. Julie's testimony on this and it looks like what would be envisioned by this is a nationwide structure, and in effect, another agency that would be created to deal with these kinds of complaints, and I am not sure that is cheaper ultimately, to set up yet another structure.

Senator **Pryor**. Mr. Fischer, if you would like to elaborate your answer to that question we would like you to submit for the record.

Mr. **Fischer**. I will be glad to.

Senator **Pryor**. My second question—I may have two or three written questions to submit for the record—previous witnesses have suggested that there should be more and different penalties for those who take prohibited actions against the whistleblower. These suggestions include demotions, transfers and increased fines for the wrongdoer.

Are there any of those changes that you would support?

Mr. **Fischer**. Well, I am in an awkward position, Mr. Chairman, because I think as an adjudicative agency, if we come out in support or in opposition to specific provisions like this, that it may come back as an allegation that we expressed either a bias in favor or against a certain kind of penalty.

Senator **Pryor**. I have probably two more questions I will submit in writing to you, Mr. Fischer.[1]

Senator Levin?

Senator **Levin**. Thank you, Mr. Chairman.

Right now when the employee carries the burden in front of the Board and introduces sufficient evidence to carry his or her burden of proof—which is a preponderance burden, I gather—at that point the burden of proceeding shifts to the agency, is that correct?

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[1] See p. 430.

Mr. **Fischer**. That is right. I assume now we are talking about corrective action?

Senator **Levin**. Yes. Now, one possibility would be to—when we shift, is that the burden of the proceeding or the burden of proof that shifts?

Mr. **Fischer**. It is the burden of coming forward with the evidence.

Senator **Levin**. All right. Now, does the burden of persuasion ever shift?

Mr. **Fischer**. The burden of persuasion does not shift.

Senator **Levin**. Does not shift?

Mr. **Fischer**. Does not shift.

Senator **Levin**. What is the burden that is placed on the employer or the agency when that burden of proceeding shifts? Is it to introduce enough evidence so that the employee cannot carry the burden of persuasion? Is that the way you would phrase it?

Mr. **Fischer**. The burden shifts to the agency at that point to show that but for the protected conduct, the action would have been taken in any event.

Senator **Levin**. That sounds to me like they then carry the burden of persuasion on that issue, is that correct?

Mr. **Fischer**. I do not know if I can answer that question as phrased.

Senator **Levin**. Is that because the question is not clear or you are just not sure what the answer is, or we are not speaking the same language here?

Mr. **Fischer**. Well——

Senator **Levin**. Am I imposing a trial court lingo on something which makes no sense to you?

Mr. **Fischer**. No. I understand your point about the burden of persuasion apparently shifting. The burden of proof remains with the Special Counsel in——

Senator **Levin**. That means the employee? It remains with the employee?

Mr. **Fischer**. Yes. Having brought the complaint on behalf of the employee.

Senator **Levin**. Yes. But you say the burden of proof does not shift, but once the employee has met the burden of introducing evidence which could meet the preponderance standard, then it is up to the employer to show that but for the protected conduct, the action would have been taken anyway?

Mr. **Fischer**. That is right.

Senator **Levin**. I have trouble conceptualizing that at the same time you say that the burden of persuasion has not shifted. It sounds to me like the burden of persuasion has shifted.

Mr. **Fischer**. Well, I do not think it has, really. I think what happens is the employer comes in with evidence that shows that but for the protected conduct, the action would have been taken in any event and the burden of proof still rests with the Special Counsel to show at that point that the reasons given by the agency were but a pretext for taking the protected conduct.

Senator **Levin**. All right. This sounds awfully technical, and I hope the Chairman will forgive me for doing this, but it does play a critical role in this bill and I want to just press it for one more minute if I may.

Senator **Pryor**. Certainly.

Senator **Levin**. It is a very technical issue, but one of the important components of this bill is the so-called "no part" standard. You heard my discussion, I believe, with Ms. Wieseman a few moments ago on that issue?

Mr. **Fischer**. Correct.

Senator **Levin**. The bill says that the reprisal can play no part in an action taken against a whistleblower. That created some problems for her and perhaps for some others.

Do you have a position on that, by the way, on the practical effects of that standard being implemented?

Mr. **Fischer**. Well, I think that——

Senator **Levin**. Would it be easier to administer the law, for instance?

Mr. **Fischer**. Well, it would be easier, certainly, for someone to prevail—the Special Counsel to prevail—on a complaint for corrective action of behalf of the employee. That is my assessment. It lessens the burden.

Senator **Levin**. There is another way to get at this issue, and that goes to the question of these burdens that we have been talking about. If we did not change the current rule—the Mt. Healthy rule—if we did not try to make any change on that, but instead did the following: Where the employee has met his or her burden and it is then up to the employer to show that the action would have been taken anyway, and where the reprisal is based in any part on the whistleblowing, we could raise the standard that the employer has to meet. We could say accept the de minimis rule, but the employer would have to show by clear and convincing evidence that the reprisal was not based on whistleblowing.

Do you see what I mean?

Mr. **Fischer**. Yes.

Senator **Levin**. We could maintain the de minimis rule but we could create a bigger hurdle for the employer.

What would your reaction be to that?

Mr. **Fischer**. Well, my reaction is that I think it achieves in some measure the same result that you mentioned earlier about lessening the burden initially, making, where reprisal is a factor, a lighter burden for the Special Counsel to carry.

Senator **Levin**. Thank you.

Mr. Chairman, I think that is something that at least I want to consider. I do not know about the other cosponsors or the members of the Committee, but that is a possibility that at least I would like to look at and alert staffs that I will be looking at. That is, where the employee has met that first test and has presented enough evidence to shift the burden, in my terms, or in Mr. Fischer's terms, to then put the burden on the employer to show that the action would have been taken anyway, then perhaps if we did not adopt the change in the Mt. Healthy rule, that we would then say to the employer that we will let you have a de minimis rule, but we are going to require you to prove by clear and convincing evidence that the action you took against the employee was not based on the whistleblowing.

It is another way, as Mr. Fischer has just testified, of achieving the same result and it is a way that we will be examining.

I want to thank the Chair for his usual patience and grace regarding some of the arcane intricacies that I have gotten into. Thank you.

Senator **Pryor**. Mr. Fischer, thank you. We thank all of our witnesses this morning.

We will keep this record open for questions that will be submitted to the witnesses. We are very indebted to you for your testimony.

Senator Levin, we thank you for once again bringing this matter to the attention of the Subcommittee. We have had two of these hearings and now I think it is going to be up to us to see if we can find some solutions to the problems that we have discovered.

The hearing is adjourned. Thank you.

[Whereupon, at 12:30 p.m., the Subcommittee adjourned subject to the call of the Chair.]

APPENDIX

100TH CONGRESS
1ST SESSION

S. 508

To amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 5, 1987

Mr. LEVIN (for himself, Mr. GRASSLEY, Mr. CHILES, Mr. RIEGLE, Mr. MITCHELL, Mr. HEINZ, Mr. COHEN, and Mr. SARBANES) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To amend title 5, United States Code, to strengthen the protections available to Federal employees against prohibited personnel practices, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Whistleblower Protection Act of 1987".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds that—

(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States

Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;

(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

(3) in passing the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel to provide whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) protection from reprisal.

(b) PURPOSES.—The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—

(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

(2) establishing—

(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers from prohibited personnel practices; and

(B) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.

SEC. 3. MERIT SYSTEMS PROTECTION BOARD; OFFICE OF SPECIAL COUNSEL; EMPLOYEE RIGHT OF ACTION.

(a) IN GENERAL.—Chapter 12 of title 5, United States Code, is amended to read as follows:

"CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

"SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

"Sec. 1201. Appointment of members of the Merit Systems Protection Board.
"Sec. 1202. Term of office; filling vacancies; removal.
"Sec. 1203. Chairman; Vice Chairman.
"Sec. 1204. Powers and functions of the Merit Systems Protection Board.
"Sec. 1205. Transmittal of information to Congress.
"Sec. 1206. Annual report.

"SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

"Sec. 1211. Establishment.
"Sec. 1212. Powers and functions of the Office of Special Counsel.
"Sec. 1213. Provisions relating to disclosures of violations of law, mismanagement, and certain other matters.
"Sec. 1214. Investigation of prohibited personnel practices; corrective action.
"Sec. 1215. Disciplinary action.
"Sec. 1216. Other mattters within the jurisdiction of the Office of Special Counsel.
"Sec. 1217. Transmittal of information to Congress.
"Sec. 1218. Annual report.

"SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CASES INVOLVING PROHIBITED PERSONNEL PRACTICES

"Sec. 1221. Individual right of action.

“SUBCHAPTER I—MERIT SYSTEMS PROTECTION BOARD

“§ 1201. Appointment of members of the Merit Systems Protection Board

“The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board. No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

“§ 1202. Term of office; filling vacancies; removal

“(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

“(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member’s predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of section 1201 of this title.

"(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than 1 year after the date on which the term of the member would otherwise expire under this section.

"(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

"§ 1203. Chairman; Vice Chairman

"(a) The President shall from time to time appoint, by and with the advice and consent of the Senate, one of the members of the Merit Systems Protection Board as the Chairman of the Board. The Chairman is the chief executive and administrative officer of the Board.

"(b) The President shall from time to time designate one of the members of the Board as Vice Chairman of the Board. During the absence or disability of the Chairman, or when the office of Chairman is vacant, the Vice Chairman shall perform the functions vested in the Chairman.

"(c) During the absence or disability of both the Chairman and the Vice Chairman, or when the offices of Chairman and Vice Chairman are vacant, the remaining Board member shall perform the functions vested in the Chairman.

"§ 1204. Powers and functions of the Merit Systems Protection Board

"(a) The Merit Systems Protection Board shall—

"(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, section 2023 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

"(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) and enforce compliance with any such order;

"(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

"(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

"(b)(1) Any member of the Merit Systems Protection Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may administer oaths, examine witnesses, take depositions, and receive evidence.

"(2) Any member of the Board, any administrative law judge appointed by the Board under section 3105, and any employee of the Board designated by the Board may, with respect to any individual—

"(A) issue subpoenas requiring the attendance and presentation of testimony of witnesses, and the production of documentary or other evidence from any place in the United States, any territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia; and

"(B) order the taking of depositions from, and responses to written interrogatories by, any such individual.

"(3) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

"(c) In the case of contumacy or failure to obey a subpoena issued under subsection (b)(2)(A), the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(d) A subpoena referred to in subsection (b)(2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

"(e)(1) In any proceeding under subsection (a)(1), any member of the Board may request from the Director of the Office of Personnel Management an advisory opinion concerning the interpretation of any rule, regulation, or other policy directive promulgated by the Office of Personnel Management.

"(2)(A) In enforcing compliance with any order under subsection (a)(2), the Board may order that any employee charged with complying with such order, other than an employee appointed by the President by and with the advice and consent of the Senate, shall not be entitled to receive payment for service as an employee during any period that the order has not been complied with. The Board shall certify to the Comptroller General of the United States that such an order has been issued, and no payment shall be made out of the Treasury of the United States for any service specified in such order.

"(B) The Board shall prescribe regulations under which any employee who is aggrieved by the failure of any other employee to comply with an order of the Board may petition the Board to exercise its authority under subparagraph (A).

"(3) In carrying out any study under subsection (a)(3), the Board shall make such inquiries as may be necessary and, unless otherwise prohibited by law, shall have access to personnel records or information collected by the Office of Personnel Management and may require additional reports from other agencies as needed.

"(f)(1) At any time after the effective date of any rule or regulation issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 of this title, the Board shall review any provision of such rule or regulation—

"(A) on its own motion;

"(B) on the granting by the Board, in its sole discretion, of any petition for such review filed with the Board by any interested person, after consideration of the petition by the Board; or

"(C) on the filing of a written complaint by the Special Counsel requesting such review.

"(2) In reviewing any provision of any rule or regulation pursuant to this subsection, the Board shall declare such provision—

"(A) invalid on its face, if the Board determines that such provision would, if implemented by any agency, on its face, require any employee to violate section 2302(b) of this title; or

"(B) invalidly implemented by any agency, if the Board determines that such provision, as it has been implemented by the agency through any personnel action taken by the agency or through any policy adopted by the agency in conformity with such provision, has required any employee to violate section 2302(b) of this title.

"(3) The Director of the Office of Personnel Management, and the head of any agency implementing any provision of any rule or regulation under review pursuant to this subsection, shall have the right to participate in such review.

"(4) The Board shall require any agency—

"(A) to cease compliance with any provisions of any rule or regulation which the Board declares under this subsection to be invalid on its face; and

"(B) to correct any invalid implementation by the agency of any provision of any rule or regulation which the Board declares under this subsection to have been invalidly implemented by the agency.

"(g) The Board may delegate any of its administrative responsibilities under this title to any employee of the Board.

"(h) The Board shall have the authority to prescribe such regulations as may be necessary for the performance of its functions. The Board shall not issue advisory opinions. All regulations of the Board shall be published in the Federal Register.

"(i) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Board may appear for the Board, and represent the Board, in any civil action brought in connection with any function carried out by the Board pursuant to this title or as otherwise authorized by law.

"(j) The Chairman of the Board may appoint such personnel as may be necessary to perform the functions of the Board. Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

"(k) The Board shall prepare and submit to the President, and, at the same time, to the appropriate committees of

Congress, an annual budget of the expenses and other items relating to the Board which shall, as revised, be included as a separate item in the budget required to be transmitted to the Congress under section 1105 of title 31.

"(l) The Board shall submit to the President, and, at the same time, to each House of the Congress, any legislative recommendations of the Board relating to any of its functions under this title.

"§ 1205. Transmittal of information to Congress

"Notwithstanding any other provision of law or any rule, regulation, or policy directive, any member of the Board, or any employee of the Board designated by the Board, may transmit to the Congress on the request of any committee or subcommittee thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Board, without review, clearance, or approval by any other administrative authority.

"§ 1206. Annual report

"The Board shall submit an annual report to the President and the Congress on its activities, which shall include a description of significant actions taken by the Board to carry out its functions under this title. The report shall also review the significant actions of the Office of Personnel Management, including an analysis of whether the actions of the Office of Personnel Management are in accord with merit system principles and free from prohibited personnel practices.

"SUBCHAPTER II—OFFICE OF SPECIAL COUNSEL

"§ 1211. Establishment

"(a) There is established the Office of Special Counsel, which shall be headed by the Special Counsel. The Office shall have an official seal which shall be judicially noticed. The Office shall have its principal office in the District of Columbia and shall have field offices in other appropriate locations.

"(b) The Special Counsel shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The Special Counsel shall be an individual who, by demonstrated ability, background, training, or experience, is especially qualified to carry out the functions of the position. A Special Counsel appointed to fill a vacancy occurring before the end of a term of office of the Special Counsel's predecessor serves for the remainder of the term. The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. The Special Counsel may not hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President.

"§ 1212. Powers and functions of the Office of Special Counsel

"(a) The Office of Special Counsel shall—

"(1) in accordance with applicable provisions of this subchapter, protect employees, former employees, and applicants for employment from prohibited personnel practices;

"(2) receive and investigate allegations of prohibited personnel practices, and, where appropriate—

"(A) bring petitions for stays, and petitions for corrective action, under section 1214 of this title; and

"(B) file a complaint or make recommendations for disciplinary action under section 1215 of this title;

"(3) receive, review, and, where appropriate, forward to the Attorney General or an agency head under section 1213 of this title, disclosures of violations of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

"(4) review rules and regulations issued by the Director of the Office of Personnel Management in carrying out functions under section 1103 of this title and, where the Special Counsel finds that any such rule or regulation would, on its face or as implemented, require the commission of a prohibited personnel practice, file a written complaint with the Board; and

"(5) investigate and, where appropriate, bring actions concerning allegations of violations of other laws within the jurisdiction of the Office of Special Counsel (as referred to in section 1216 of this title).

"(b)(1) The Special Counsel and any employee of the Office of Special Counsel designated by the Special Counsel may administer oaths, examine witnesses, take depositions, and receive evidence.

"(2) The Special Counsel may—

"(A) issue subpoenas; and

"(B) order the taking of depositions and order responses to written interrogatories;

in the same manner as provided under section 1204.

"(3) In the case of contumacy or failure to obey a subpoena issued under paragraph (2)(A) the United States district court for the judicial district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(4) A subpoena referred to in paragraph (2)(A) may, in the case of any individual outside the territorial jurisdiction of any court of the United States, be served in such manner as the Federal Rules of Civil Procedure prescribe for service of a subpoena in a foreign country. To the extent that the courts of the United States can assert jurisdiction over such individual, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance under this subsection by such individual that such court would have if such individual were personally within the jurisdiction of such court.

"(5) Witnesses (whether appearing voluntarily or under subpoena) shall be paid the same fee and mileage allowances which are paid subpoenaed witnesses in the courts of the United States.

"(c) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Special Counsel may appear for the Office of Special Counsel, and represent the Office, in any civil action brought in connection with any function carried out by the Office pursuant to this title or as otherwise authorized by law.

"(d)(1) Except as provided in paragraph (2), the Special Counsel may as a matter of right intervene or otherwise participate in any proceeding before the Merit Systems Protection Board, except that the Special Counsel shall comply with the rules of the Board.

"(2) The Special Counsel may intervene or otherwise participate in an action brought by an individual under section 1221 of this title or in an appeal brought by an employee under section 7701 of this title only with the consent of such individual or employee.

"(3)(A) The Special Counsel may obtain judicial review of any final order or decision of the Merit Systems Protection Board in which the Special Counsel was a party.

"(B) A petition for review under this paragraph shall be filed with such court, and within such time, as provided for under section 7703(b) of this title.

"(e)(1) The Special Counsel may appoint the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel.

"(2) Any appointment made under this subsection shall be made in accordance with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

"(f) The Special Counsel may prescribe regulations relating to the receipt and investigation of matters under the jurisdiction of the Special Counsel. Such regulations shall be published in the Federal Register.

"(g) The Special Counsel shall not issue any advisory opinion concerning any law, rule, or regulation (other than an advisory opinion concerning chapter 15 or subchapter III of chapter 73).

"§ 1213. Provisions relating to disclosures of violations of law, mismanagement, and certain other matters

"(a) This section applies with respect to—

"(1) any disclosure of information by an employee, former employee, or applicant for employment which the employee, former employee, or applicant reasonably believes evidences—

"(A) a violation of any law, rule, or regulation; or

"(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; and

"(2) any disclosure by an employee, former employee, or applicant for employment to the Special Counsel or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee, former employee, or applicant reasonably believes evidences—

"(A) a violation of any law, rule, or regulation; or

"(B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

"(b) Whenever the Special Counsel receives information of a type described in subsection (a) of this section, the Special Counsel shall review such information and, within 15 days after receiving the information, determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation, or mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health and safety.

"(c)(1) Subject to paragraph (2), if the Special Counsel makes a positive determination under subsection (b) of this section, the Special Counsel shall promptly transmit the information with respect to which the determination was made to the appropriate agency head and require that the agency head—

"(A) conduct an investigation with respect to the information and any related matters transmitted by the Special Counsel to the agency head; and

"(B) submit a written report setting forth the findings of the agency head within 60 days after the date on which the information is transmitted to the agency head or within any longer period of time agreed to in writing by the Special Counsel.

"(2) The Special Counsel may require an agency head to conduct an investigation and submit a written report under paragraph (1) only if the information was transmitted to the Special Counsel by—

"(A) an employee, former employee, or applicant for employment in the agency which the information concerns; or

"(B) an employee who obtained the information in connection with the performance of the employee's duties and responsibilities.

"(d) Any report required under subsection (c) shall be reviewed and signed by the head of the agency and shall include—

"(1) a summary of the information with respect to which the investigation was initiated;

"(2) a description of the conduct of the investigation;

"(3) a summary of any evidence obtained from the investigation;

"(4) a listing of any violation or apparent violation of any law, rule, or regulation; and

"(5) a description of any action taken or planned as a result of the investigation, such as—

"(A) changes in agency rules, regulations, or practices;

"(B) the restoration of any aggrieved employee;

"(C) disciplinary action against any employee; and

"(D) referral to the Attorney General of any evidence of a criminal violation.

"(e)(1) Any such report shall be submitted to the Special Counsel, and the Special Counsel shall transmit a copy to the complainant, except as provided under subsection (f) of this section. The complainant may submit comments to the Special Counsel on the agency report within 15 days of having received a copy of the report.

"(2) Upon receipt of any report of the head of an agency required under subsection (c) of this section, the Special Counsel shall review the report and determine whether—

"(A) the findings of the head of the agency appear reasonable; and

"(B) the report of the agency under subsection (c)(1) of this section contains the information required under subsection (d) of this section.

"(3) The Special Counsel shall transmit any agency report received pursuant to subsection (c) of this section, any comments provided by the complainant pursuant to subsection (e)(1), and a copy of the original disclosure to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General.

"(4) Whenever the Special Counsel does not receive the report of the agency within the time prescribed in subsection (c)(2) of this section, the Special Counsel shall transmit a copy of the information which was transmitted to the agency head to the President, the congressional committees with jurisdiction over the agency which the disclosure involves, and the Comptroller General together with a statement noting the failure of the head of the agency to file the required report.

"(f) In any case in which evidence of a criminal violation obtained by an agency in an investigation under subsection (c) of this section is referred to the Attorney General—

"(1) the report shall not be transmitted to the complainant; and

"(2) the agency shall notify the Office of Personnel Management and the Office of Management and Budget of the referral.

"(g) If the Special Counsel does not make a positive determination under subsection (b), or if the information (as described in subsection (a)) is transmitted to the Special Counsel other than by an individual described in subparagraph (A) or (B) of subsection (c)(2), the Special Counsel—

"(1) shall return any information and any other matter provided by the individual who made the disclosure; and

"(2) shall inform that individual of—

"(A) the reasons why the disclosure may not be further acted on under this chapter; and

"(B) any recourse (administrative or otherwise) available under law, rule, or regulation, should the individual wish to pursue the matter further.

"(h)(1) Subject to paragraph (2), the identity of any employee, former employee, or applicant for employment who makes a disclosure described in subsection (a) may not be disclosed by the Special Counsel without the consent of the employee, former employee, or applicant unless the Special Counsel determines that the disclosure of the identity of the employee, former employee, or applicant is necessary in order to carry out the functions of the Special Counsel.

"(2) The identity of any employee, former employee, or applicant for employment whose disclosure (as described in subsection (a)) may not, under subsection (g), be further acted on under this chapter may not be disclosed under any circumstances.

"(i) Except as specifically authorized under this section, the provisions of this section shall not be considered to authorize disclosure of any information by any agency or any person which is—

"(1) specifically prohibited from disclosure by any other provision of law; or

"(2) specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.

"(j) With respect to any disclosure of information described in subsection (a) which involves foreign intelligence or counterintelligence information, if the disclosure is specifically prohibited by law or by Executive order, the Special Counsel shall transmit such information to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

"(k) The Special Counsel shall maintain and make available to the public a list of noncriminal matters referred to heads of agencies under subsection (c), together with reports by the heads of agencies under subsection (c)(1)(B) relating to such matters. The Special Counsel shall take steps to ensure that any such public list does not contain any information the disclosure of which is prohibited by law or by Executive order requiring that information be kept secret in the interest of national defense or the conduct of foreign affairs.

"§ 1214. Investigation of prohibited personnel practices; corrective action

"(a)(1) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

"(2) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of the termination of the investigation, all the facts ascertained by the Special Counsel, and the reasons for terminating the investigation.

"(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee, former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action from the Special Counsel and—

"(A) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; or

"(B) sixty days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

"(4) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

"(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

"(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate.

"(iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

"(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

"(2)(A) If, during the pendency of a stay ordered under paragraph (1), the agency does not act to correct the prohibited personnel practice, and the Special Counsel continues to believe there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall petition the Board for corrective action.

"(B) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

"(3)(A) Whenever the Special Counsel petitions the Board for corrective action, the Board shall provide an opportunity for—

"(i) oral or written comments by the Special Counsel and the agency involved; and

"(ii) written comments by any individual who alleges to be the subject of the prohibited personnel practice.

"(4)(A) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the Special Counsel has demonstrated that a prohibited personnel practice, as described under paragraphs (1) through (7), and (9) through (11) of section 2302(b) has occurred, exists, or is to be taken.

"(B)(i) Subject to the provisions of clause (ii), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the Special Counsel has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against the individual.

"(ii) Corrective action under clause (i) shall not be ordered if—

"(I) the personnel action involved is justified on a basis independent of the disclosure referred to in clause (i); and

"(II) the agency demonstrates that such personnel action was taken or is to be taken solely for the reasons under subclause (I).

"(c)(1) Judicial review of any final order or decision of the Board under this section may be obtained—

"(A) by any employee, former employee, or applicant for employment adversely affected by such order or decision; or

"(B) by the Special Counsel.

"(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

"(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the

Office of Personnel Management and the Director of the Office of Management and Budget.

"(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding instituted under this subchapter notwithstanding that the alleged violation has been reported to the Attorney General.

"(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

"(1) that the head of the agency has personally reviewed the report; and

"(2) what action has been or is to be taken, and when the action will be completed.

"(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

"§ 1215. Disciplinary action

"(a)(1) Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having—

"(A) committed a prohibited personnel practice,

"(B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or

"(C) knowingly and willfully refused or failed to comply with an order of the Merit Systems Protection Board,

the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection.

"(2) Any employee against whom a complaint has been presented to the Merit Systems Protection Board under paragraph (1) is entitled to—

"(A) a reasonable time to answer orally and in writing, and to furnish affidavits and other documentary evidence in support of the answer;

"(B) be represented by an attorney or other representative;

"(C) a hearing before the Board or an administrative law judge appointed under section 3105 and designated by the Board;

"(D) have a transcript kept of any hearing under subparagraph (C); and

"(E) a written decision and reasons therefor at the earliest practicable date, including a copy of any final order imposing disciplinary action.

"(3) A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

"(4) There may be no administrative appeal from an order of the Board. An employee subject to a final order imposing disciplinary action under this subsection may obtain judicial review of the order by filing a petition therefor with such court, and within such time, as provided for under section 7703(b).

"(5) In the case of any State or local officer or employee under chapter 15, the Board shall consider the case in accordance with the provisions of such chapter.

"(b) In the case of an employee in a confidential, policy-making, policy-determining, or policy-advocating position appointed by the President, by and with the advice and consent of the Senate (other than an individual in the Foreign Service of the United States), the complaint and statement referred to in subsection (a)(1), together with any response of the employee, shall be presented to the President for appropriate action in lieu of being presented under subsection (a).

"(c)(1)(A) In the case of an individual under clause (i) or (ii) of subparagraph (B), the Special Counsel may transmit recommendations for disciplinary or other appropriate action (including the evidence on which such recommendations are based) to the head of the Federal agency concerned.

"(B) This subsection applies with respect to—

"(i) members of the uniformed services; and

"(ii) individuals employed by any person under contract with an agency to provide goods or services.

"(2) In any case in which the Special Counsel transmits recommendations to an agency head under paragraph (1), the agency head shall, within 60 days after receiving such recommendations, transmit a report to the Special Counsel on each recommendation and the action taken, or proposed to be taken, with respect to each such recommendation.

"§ 1216. Other matters within the jurisdiction of the Office of Special Counsel

"(a) In addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegation concerning—

"(1) political activity prohibited under subchapter III of chapter 73, relating to political activities by Federal employees;

"(2) political activity prohibited under chapter 15, relating to political activities by certain State and local officers and employees;

"(3) arbitrary or capricious withholding of information prohibited under section 552, except that the Special Counsel shall make no investigation of any withholding of foreign intelligence or counterintelligence information the disclosure of which is specifically prohibited by law or by Executive order;

"(4) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking; and

"(5) involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action.

"(b) The Special Counsel shall make no investigation of any allegation of any prohibited activity referred to in paragraphs (4) and (5) of subsection (a), if the Special Counsel determines that the allegation may be resolved more appropriately under an administrative appeals procedure.

"§ 1217. Transmittal of information to Congress

"Notwithstanding any other provision of law or any rule, regulation, or policy directive, the Special Counsel or any employee of the Special Counsel designated by the Special Counsel, may transmit to the Congress on the request of any committee or subcommittee, thereof, by report, testimony, or otherwise, information and views on functions, responsibilities, or other matters relating to the Office, without review, clearance, or approval by any other administrative authority.

"§ 1218. Annual report

"The Special Counsel shall submit an annual report to the Congress on the activities of the Special Counsel, including the number, types, and disposition of allegations of prohibited personnel practices filed with it, investigations conducted by it, and actions initiated by it before the Merit Systems Protection Board, as well as a description of the recommendations and reports made by it to other agencies pursuant to this subchapter, and the actions taken by the agencies as a result of the reports or recommendations. The report required by this section shall include whatever recommendations for legislation or other action by Congress the Special Counsel may consider appropriate.

"SUBCHAPTER III—INDIVIDUAL RIGHT OF ACTION IN CASES INVOLVING PROHIBITED PERSONNEL PRACTICES

"§ 1221. Individual right of action

"(a)(1) Notwithstanding the provisions of subsection (b) through (h) of this section, and subject to the provisions of paragraph (2) of this subsection, any employee, former employee, or applicant for employment with respect to any personnel action taken or proposed to be taken against such employee, former employee or applicant for employment, as a result of any prohibited personnel practice shall seek corrective action from the Special Counsel before seeking corrective action from the Merit Systems Protection Board.

"(2) Paragraph (1) may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

"(b) Subject to the provisions of subsection (a)(1) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice, seek corrective action from the Merit Systems Protection Board.

"(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (b) may request that the Board order a stay of the personnel action involved.

"(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, unless the Board determines—

"(A) that there is not a substantial likelihood that the individual will prevail; or

"(B) that granting the stay would result in extreme hardship to the agency which would be subject to the order.

"(3)(A) Except as provided in subparagraph (B), a stay granted under this subsection shall remain in effect until a final order or decision is rendered by the Board.

"(B) The Board may modify or dissolve a stay under this subsection at any time upon a showing by the agency involved that a failure to grant the request to modify or dissolve the stay (as the case may be) would result in extreme hardship to the agency.

"(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (b), the Board may issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that such subpoena is necessary for the development of relevant evidence.

"(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

"(e)(1) The Board shall order such corrective action as the Board considers appropriate, if the Board determines that the employee, former employee, or applicant for employment has demonstrated that a prohibited personnel practice, as described under paragraphs (1) through (7), and (9) through (11) of section 2302(b) has occurred, exists, or is to be taken.

"(2)(A) Subject to the provisions of subparagraph (B), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant.

"(B) Corrective action under subparagraph (A) shall not be ordered if—

"(i) the personnel action involved is justified on a basis independent of the disclosure referred to in subparagraph (A); and

"(ii) the agency demonstrates that such personnel action was taken or is to be taken solely for the reasons under clause (i).

"(f) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

"(g) If an employee, former employee, or applicant for employment is the prevailing party, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other costs incurred.

"(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

"(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

"(i)(1) An individual eligible to commence proceedings before the Board under this section or section 7513(d) with respect to a prohibited personnel practice may commence proceedings under either such section, but not both.

"(2) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice is involved.".

(b) Conforming Amendment.—The analysis for part II of title 5 of the United States Code is amended by striking the item relating to chapter 12 and inserting the following:

"12. Merit Systems Protection Board, Office of Special Counsel, and Employee Right of Action .... 1201".

SEC. 4. JUDICIAL REVIEW.

(a) Named Respondent.—Section 7703(a)(2) of title 5, United States Code, is amended to read as follows:

"(2)(A) Except as provided in subparagraph (B), the Board shall be the named respondent in any proceeding brought pursuant to this subsection.

"(B) If the employee or applicant for employment seeks review, on the merits, of a final order or decision issued by the Board under section 7701, the agency responsible for taking the action appealed to the Board shall be the named respondent.".

(b) Venue.—Section 7703(b)(1) of title 5, United States Code, is amended by striking "Circuit." and inserting

"Circuit or a United States court of appeals for the judicial circuit within which the petitioner resides.".

SEC. 5. REPRISALS.

Section 2302(b)(9) of title 5, United States Code, is amended to read as follows:

"(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal—

"(A) for the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

"(B) for testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A);

"(C) for cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

"(D) for failing to follow orders to disobey a law;".

SEC. 6. TENNESSEE VALLEY AUTHORITY.

Section 2302(a)(2)(C)(i) of title 5, United States Code, is amended to read as follows:

"(i) a Government corporation (other than the Tennessee Valley Authority);".

SEC. 7. INTERIM RELIEF.

Section 7701(b) of title 5, United States Code, is amended by adding at the end the following: "If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless the deciding official determines that, under the facts and circumstances, the granting of such relief would not be appropriate. Nothing in the preceding sentence requires that any award of back pay or attorney fees be paid before the decision has become final.".

SEC. 8. SAVINGS PROVISIONS.

(a) Orders, Rules, and Regulations.—All orders, rules, and regulations issued by the Merit Systems Protection Board or the Special Counsel before the effective date of this Act shall continue in effect, according to their terms, until modified, terminated, superseded, or repealed.

(b) Administrative Proceedings.—No provision of this Act shall affect any administrative proceedings pending at the time such provisions take effect. Orders shall be issued in such proceedings, and appeals shall be taken therefrom, as if this Act had not been enacted.

(c) Suits and Other Proceedings.—No suit, action, or other proceeding lawfully commenced by or against the members of the Merit Systems Protection Board, the Special Counsel, or officers or employees thereof, in their official capacity or in relation to the discharge of their official duties, as in effect immediately before the effective date of this Act, shall abate by reason of the enactment of this Act. Determinations with respect to any such suit, action, or other proceeding shall be made as if this Act had not been enacted.

SEC. 9. AUTHORIZATION OF APPROPRIATIONS; RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978; TRANSFER OF FUNDS.

(a) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated—

(1) for each of fiscal years 1988, 1989, 1990, 1991, and 1992, $20,000,000 to carry out subchapter I of chapter 12 of title 5, United States Code (as amended by this Act); and

(2) for each of fiscal years 1988, 1989, and 1990, $5,000,000 to carry out subchapter II of chapter 12 of title 5, United States Code (as amended by this Act).

(b) RESTRICTION RELATING TO APPROPRIATIONS UNDER THE CIVIL SERVICE REFORM ACT OF 1978.—No funds may be appropriated to the Merit Systems Protection Board or the Office of Special Counsel pursuant to section

903 of the Civil Service Reform Act of 1978 (5 U.S.C. 5509 note).

(c) TRANSFER OF FUNDS.—The personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available or to be made available to the Special Counsel of the Merit Systems Protection Board are, subject to section 1531 of title 31, United States Code, transferred to the Special Counsel referred to in section 1211 of title 5, United States Code (as added by section 3(a) of this Act), for appropriate allocation.

SEC. 10. TECHNICAL AND CONFORMING AMENDMENTS.

(a)(1) Section 2303(c) of title 5, United States Code, is amended by striking "the provisions of section 1206" and inserting "applicable provisions of sections 1214 and 1221".

(2) Sections 7502, 7512(E), 7521(b)(C), and 7542 of title 5, United States Code, are amended by striking "1206" and inserting "1215".

(3) Section 1109(a) of the Foreign Service Act of 1980 (22 U.S.C. 4139(a)) is amended by striking "1206" and inserting "1214 or 1221".

(b) Section 3393(g) of title 5, United States Code, is amended by striking "1207" and inserting "1215".

SEC. 11. EFFECTIVE DATE.

The amendments made by this Act shall take effect on October 1, 1987.

Testimony of
Senator Charles E. Grassley

Mr. Chairman, I would like to thank you and this subcommittee for the opportunity to testify this morning on an issue of enormous importance -- that of the welfare of government whistleblowers -- as well as a measure to greatly improve the procedural protections of civil servants -- that of the Whistleblower Protection Act of 1987.

I am pleased to join my friend and distinguished colleague, and author of the bill, Senator Levin, both in testimony and in co-sponsorship of this important legislation. Senator Levin has demonstrated consistent leadership in this area for many years, and has developed a valued expertise with respect to strengthening protections for government whistleblowers.

Mr. Chairman, I also wish to commend you for your support and leadership in the protection of our federal workers. You and I have faced many battles together, fighting the administration on behalf of whistleblowers. And although we are members of different political parties, we are on the same side in opposition to a system fraught with cracks and flaws, and in bad need of reapir. I appreciate the opportunity to express my views before this subcommittee, and encourage you to take a serious and discerning look at the Whistleblower

Protection Act of 1987 in the context of the vulnerabilities of federal whistleblowers to retaliation and unfair treatment.

My remarks today will attempt to provide a general understanding for why this bill is necessary. It is true that progress has been made in recent years to protect and encourage whistleblowing. Last year, for instance, Congress passed a law which I sponsored to encourage and protect whistleblowers largely in the private sector. We called that law the "Abe Lincoln Law." It allows private citizens who know of fraud to bring legal suits on behalf of the government, and then claim a piece of the action.

What we must do now is to provide similar and far-reaching protections and incentives for government employees. And that, Mr. Chairman, is what this bill is intended to do.

Under this legislation, a window would be created, within the Administrative Law process, for federal workers to take their cases to the federal court system, either through the appeals process or through the Office of Special Counsel, acting as attorney. This must certainly be seen as a ray of hope for whistleblowers.

It is our hope, Mr. Chairman, that through the coming weeks, we can refine this legislation, if need be, as it moves through the legislative process. As with any legislation, this bill is by no means a panacea. But it does provide substantial protection for whistleblowers that does not exist in current law.

In the present environment, the Administration is seemingly engaged in a multiple-thrust attack on all fronts against whistleblowing. The whistleblower's only hope is something akin to the Charge of the Light Brigade. There are rarely any survivors.

As a case in point, there is currently another assault on the flank of civil servants: the requirement for government employees to sign form SF-189, the Classified Information Nondisclosure Agreement.

This agreement appears to be in direct conflict with 5 U.S.C. 2302 (b)(8), which was passed as part of the Civil Service Reform Act of 1978. This law makes it illegal to take or fail to take a personnel action as a reprisal for legitimate disclosures of information. SF-189 does not contain limitations to recognize this statutory protection.

Pursuant to this agreement, several government employees have already had their clearances pulled for failing to sign an agreement which contains vague and ambiguous language, and which would clearly threaten a whistleblower's ability to disclose information of mismanagement and abuse. In addition to those whose clearances have been pulled, others, including the nation's most credible and cherished whistleblowers, have been given 30-day notices for not signing this form. In some cases, a revoking of clearance could mean a loss of job. I have requested of Administration officials that the requirement to sign this form be suspended until such time as Congress has had a chance to review its evolution. You also, Mr. Chairman, have acted to seek a suspension. I hope we can work together with others of our colleagues to critically review this matter and help ensure the greatest possible protection of those who "blow the whistle."

These and other assaults on the rights of federal workers are the best testimony of a great need for the Whistleblower Protection Act of 1987. It is our hope that we can work with you and your subcommittee, Mr. Chairman, to improve this bill and provide maximum protection for those who fulfill one of the most crucial needs in all of public service. I would like to congratulate my colleague, Senator Levin, for his excellent work in crafting this bill, and I commend you, Mr. Chairman, for your obvious and deep concern for the welfare of whistleblowers in government. I look forward to a fruitful working relationship with your subcommittee.

Thank you, Mr. Chairman.

TESTIMONY OF
MR. HAROLD R. HIPPLE

Mr. Chairman,

Thank you for requesting my testimony today and other assistance as part of your investigation into the adequacy of whistleblower protection laws in the civil service system. I'm honored and grateful to have this opportunity. My name is Harold Hipple. With me is my attorney Tom Carpenter from the Government Accountability Project (GAP). From September 14, 1981 until May 30, 1986, I was a Veterans' Administration (VA) Police Officer. On October 1, 1985, I was promoted to a supervisory position. As a supervisory officer, I was responsible not only for providing security at the Cincinnati VA Medical Center (VAMC) for the protection of patients, employees, and visitors but also for coordinating the activities of the officers on duty and acting in an advisory capacity to the Chief of Police.

I have come to testify today against police brutality instigated by Cincinnati VAMC Chief Daniel Wilson and of my disillusionment with the Office of the Special Counsel (OSC) since I came forward. During my nearly 35 years of law enforcement experience, with the Military Police, the Cincinnati Police Department and the VA Police, I have been proud of my job and believed deeply in my public service mission. The Chief's brutality and the Special Counsel's coverup are the type of lawless behavior that I thought police were supposed to protect the public against. This testimony summarizes my now complete disclosure for your investigation, which is enclosed as Attachment I along with relevant exhibits.

In February 1985 Daniel R. Wilson became the Chief of

Security at the Cincinnati Medical Facility. VAMC officers soon learned that there could be questionable Civil Service practices. We received the impression that Wilson had a hit list intended for supervisors, as they were forced out one by one. On one occasion Chief Wilson, while talking in my presence, stated that the VAMC had been troubled for a long time by certain people, and he said that as soon as he could get rid of certain people, "this [VAMC] will be a better place for me. Malden and King (two employees who were harassed until they left) were only the beginning," he said. Wilson further stated that part of the reason he was brought on the job by Mr. Fazone, the VA Chief for the whole agency, was to clean out those people whom he considered the problems and get in his own friends.

We realized that a buddy system was occurring in September or October 1985 when a detective position opened up. Along with several of the officers at the Cincinnati facility, I was interested in the position. Wilson, however, stated that there was no chance for any of us at Cincinnati, because we did not qualify and because a friend of his from Dallas or Chicago would get the job. He added that that would be the case with all other vacancies. I noticed that no vacancy announcement for the position was ever posted on the board. Another officer from a different VA facility told me that he did see the vacancy announcement posted, but it was posted just two days before the application deadline. It is my understanding that it is illegal under civil service law to hire friends without posting vacancy announcements, because that practice encourages the buddy system and makes it very difficult to have fair competition under merit system principles. I later informed an investigator from the Merit Systems Protection Board's Office of the Special Counsel about this practice, which kept getting repeated. The investigator did not comment or follow through with me on the matter. I later learned that this method of handling complaints is a common practice of the OSC.

In 1985, however, I was even more concerned about Chief Wilson's treatment of people as stories of brutality began circulating among the officers. John Berter had recounted to me the brutality which Wilson had inflicted upon black patients and visitors. In some instances, without reading them their rights or even speaking to them of their alleged offenses, according to Berter, Wilson would kick them from behind in the groin, stand on top of the area around their testicles, gouge their eyes, pound their faces into the wall, and engage in similar violence. Berter was extremely concerned, as were other officers with similar accounts.

In November 1985, I personally witnessed the excessive force and abuse used in the arrest of John R. Shives, a VA patient. Mr. Shives was visiting the hospital on an outpatient basis. As he pulled into the VA parking lot and parked illegally in a restricted area, one of the officers asked him to move his van. But Shives went in the building to register for his shots anyway. Later Shives returned to move his van. I had advised one of the officers to give him a ticket. Shives ignored the officer and drove off VA property, parking on city streets. After Shives reparked his van, he returned to the hospital in order to get the shots. I was called by radio to the scene, and I informed Shives that he would be getting a ticket for his illegal parking. He disagreed with us but remained calm. His behavior was not out of the ordinary for a citizen who thinks he is wrongly receiving a ticket.

As Chief Wilson arrived on the scene after apparently hearing the radio call for my response, Wilson immediately began hollering at Shives and shouting into his face at such close range that Wilson's and Shives' stomachs were touching. Wilson appeared intent on deliberately provoking Shives with verbal abuse by degrading Shives as a man. Wilson called him a "Dirtball," "Scumbag," and "Black Bastard," among other names. Finally, Shives raised his arms as if to move past Wilson but then dropped his arms after Wilson warned Shives not to touch him or else he would charge Shives with assault. When Shives complied, Wilson grabbed him in a bear hug. The Chief tried to kick Shives' legs out from under him but in the process kicked me also, causing a blood vessel to burst in my leg. (I was incapacited, had to be treated at the hospital, and had to miss several days of work.) Wilson shouted for other officers to put Shives down. With the help of the other officers, Shives was wrestled to the ground. Because events were getting out of control, I thought the best thing was to help neutralize the situation. I held Shives' right arm, and he offered no resistance. Wilson, however, seeing that Shives was defenseless, began choking him and gouging him in the eyes. Shives was screaming in pain as Wilson abused him and gasped that if Wilson stopped choking and hurting him, he would give his hands so that cuffs could be put on. This event went on for several minutes.

Wilson wanted to hold Shives on four charges, but I talked the Chief into dropping two of them -- all but disorderly conduct and resisting arrest. Shives was held with the handcuffs on for almost three hours. I felt that Chief Wilson's violent and abusive actions were totally uncalled for and should not be allowed to continue. I am certain that the whole incident would not have occurred if Wilson had not responded and deliberately caused the conflict. Shives was not hostile by any means until provoked by Wilson.

This event and other similar incidents that I had heard from co-workers prompted me to help three other officers, including Mr. Berter, to draft an anonymous November 1985 letter relating the incidents of brutality and abuse that we had seen Wilson participate in. Toward the end of November 1985, over 100 of these letters were sent to various groups and agencies such as the FBI, civil rights organizations, congressmen and senators.

At the beginning of January 1986, I began to notice a change in Chief Wilson's attitude towards me. On the morning of the 14th, Chief Wilson called Officers Ketron and Helm separately into his office and asked them if they knew of any officers who were taking food or leaving post while on duty. Officer Ketron affirmed that Corporal Johnson and Officers Loeb and Fehr often left the premises to eat at a local restaurant. Chief Wilson snapped, "I don't want to know about them, just Hipple!"

On the night of the 14th, at about 9:05 p.m., I was called from my scheduled watch to Chief Wilson's office. Upon arriving, I found Wilson furious. He proceeded to levy a barrage of lies and false accusations against me. I was shocked by his behavior and by the charges. This session went on for about 45 minutes and left me emotionally and physically wracked.

The only coherent accusation made against me that night regarded my alleged taking of food from the kitchen. Several weeks later I was told that four formal charges were being brought against me: 1) stealing food from the kitchen on one occasion between November 18-30, 1985, which is theft of Government property; 2) failure to respond to three door alarms on January 14, 1986; 3) misconduct by a VA police officer on January 14, 1986; and 4) falsifying the daily journal on January 14, 1986. I found all of these charges preposterous. As I learned later during the discovery hearings prior to dismissal appeal hearing, Chief Wilson went to great lengths to frame me for each of these charges.

Indeed, the charges made against me by the Chief were fabricated and completely unsubstantiated. In regard to Officer Fehr's assertion that he and I took two trays of food from the cafeteria while we were on duty together between November 18-30, 1985, I have never taken food from the cafeteria. Moreover, as I went back and checked my work records, the files showed that the only days that Fehr and I worked the 4 p.m. to midnight shift together during November were the 4th, 5th, and 7th of the month, thereby rendering his story impossible.

Another incredulous accusation is that I was negligent, because I failed to respond to two alarms that were simultaneously tripped by two officers assisting Chief Wilson on the night of the 14th. In fact, neither I nor my subordinate, Officer Reno, received radio notification of these alarms.

The third misconduct charge was that I failed to accost and question Wilson and Corporal Johnson, who were on the VA grounds around 9:00 p.m., dressed in civilian clothes, and that I screamed, "That's a bunch of fucking shit!" when the Chief later interrogated me on January 14. In the first instance, I recognized Wilson and Johnson and saw no reason to apprehend them despite their appearances. It is their right to dress in civilian clothes on their own time. In the second instance, it is not in my nature to use such gutter language. That is Chief Wilson's way of expressing himself, not mine.

Nor is it my nature to falsify records, the fourth charge. In fact, as a matter of daily habit, I unroll the computer tape in the switchboard unit, which records alarm activity, and transfer the alarm information to my activity journal in order to complete the entries precisely in my journal. Since I had been detained by Wilson for 45 minutes, I wanted to see what had transpired during that time. Although I had to take the word of Officer Reno (the officer with whom I was working that night) for some of the entries regarding his activities that evening, I did not deliberately falsify anything in my journal.

I responded to Chief Wilson's charges in a March 4, 1986 letter to Mr. Donald Ziegenhorn, Director of the Cincinnati VAMC, and gave more written and verbal response on March 18 to the Associate Director Mr. Sabin. These responses were totally ignored by the VA, with the exception of amending the allegations to correct the impossibilities I had exposed. On May 5, 1986, I was notified that I would be dismissed effective May 30, 1986. At that time I was told that I could appeal my dismissal to the Merit Systems Protection Board. I filed an appeal on May 27, 1986. Depositions were taken in early August of 1986. It became obvious during these depositions that Wilson had staged the events of January 14, 1986. The Veterans' Administration was forced to effectively acknowledge that it had no case and on September 15, 1986 settled on terms with which I was extremely pleased.

Nevertheless, Wilson continues as Chief of Security at the Cincinnati Medical Facility because, according to him, he has friends in influential places. On January 15, 1986 -- the morning after his tirade against me -- Chief Wilson had called a mandatory meeting for all officers. He announced that some VA police officers sent a letter to the FBI, accusing him of police brutality. Wilson went on to explain that he had spoken with Mr. Daly of the FBI, who was a personal friend of Wilson's from his hometown. Wilson stated that Daly doesn't like cops' telling on other cops. In addition, Wilson made mention of Mr. Fazone, the VA Chief in Washington. Wilson claimed that Fazone was his mentor and that both Fazone and the director of the Cincinnati hospital were completely behind him. He said the worst that could happen to him was to be transferred but that whoever made the charges would be fired.

Wilson's remarks about the FBI investigation turned out to be prophetic. By the middle of February, we could see no signs of an investigation. My attorney, Mr. Don Hardin, made three attempts to arrange meetings for Berter, another officer and myself to discuss our charges with FBI officers. The FBI would not see us or return Hardin's calls. We later learned that Mr. Daly, the FBI officer whom Wilson claimed was a personal friend of his, is in charge of the Civil Rights Division -- the division that our requests would go through.

Finally, we were able to give statements to one of the agents there, Agent Driskill, who assured us that action was forthcoming. Agent Mike McDaniels, who was later assigned to the case, appeared to be as concerned as we were about the brutality. He worked hard and encouraged us. The overall handling of the FBI investigation raised questions, though. This I learned from Bob Hauck, a pharmacy technician employed at the VAMC. Bob's involvement with Chief Wilson stemmed from the fact that his wife at the time, Clara, (a labor relations specialist at the VA, who was heavily involved in my case, beyond her normal role) was having an affair with the Chief. Around the time the affair began, Wilson had tried to accuse Hauck of [illegible]ealing drugs and other government property --charges that did not stick and were ridiculed by other hospital personnel. In early May Bob mentioned that an FBI investigation was looking into Wilson and his law enforcement methods. According to Hauck, Clara unexpectedly blurted out, "Dan is a good guy and has done nothing wrong! The 75 page report I read showed it was the other officers who were at fault." This information made me highly suspicious, because at the time she allegedly said this, the report had not yet been released. Two weeks later, FBI Agent McDaniels announced that his 75 page report on the VAMC had been sent to Washington for recommended prosecution and contained ten crimes. Unless she were bluffing, I wondered how Clara Hauck could possibly get her hands on the report unless it had been given to Chief Wilson by an insider? Agent McDaniels also told me later that he was not getting much response from the Department of Justice in Washington, but that he wanted to keep taking evidence because he knew it was a prosecutable case.

Unfortunately, our experiences with the Office of the Special Counsel were totally frustrating. Mr. Berter has informed me that in May 1986 he first contacted the OSC, a division of the Merit Systems Protection Board whose job in theory is to protect and give counsel to whistleblowers such as Berter and myself. They did not respond in a timely manner. It was not until early September, just before my settlement, that they arrived and interviewed me. In the meantime, Mr. Berter was harassed continuously on the job.

When they finally arrived, the OSC investigators said they were interested in knowing some of the things I had seen and heard concerning Chief Wilson. The OSC interviewed me for around 1.5 hours in a restaurant but took no sworn statements and did not press for details. I waited for a detailed interview but never received one. After the initial interview, nearly all our communications were a one-way street -- from me to the OSC.

On one occasion by phone, I told OSC investigator Vince Russell about the January 15, 1986 meeting that Wilson held with all the officers. It was in this meeting that Wilson told us the FBI investigation would go nowhere and that nothing would happen to him. When I relayed this information to Russell, he immediately became indignant and said, "Do you mean to insinuate that there has been a coverup by an FBI agent? That's a very serious charge and you better be able to back it up." I was amazed at how quickly Russell forgot about Chief Wilson and began accusing me. I was only quoting Wilson. The Chief should have been the one accused.

Another conflict I had with the OSC concerned a polygraph test. Prior to my appeal hearing, Officer Reno and I offered to take a polygraph test to verify that our statements were true and factual. I agreed to do this only if Chief Wilson would agree to take a test also. Wilson suspiciously declined. After my settlement with the VA, I agreed to take a polygraph for the OSC, feeling that this would help the other officers. Since I had already settled, I had nothing to gain for myself.

Several months later, in early March 1987, I learned that the Justice Department had closed the case without prosecution. I called Christine Durbin at the OSC and asked her what we should do next. She explained that the OSC could not give advice because they do not represent the whistleblower and therefore have no obligation under an attorney-client relationship. She further added that they really couldn't do much, because my lie detector results were inconclusive. However, only the first test was inconclusive due to my strong reactions to Chief Wilson's name whenever it was mentioned during the test. After the second and final test, which I insisted on taking because I knew I had told the truth, the polygrapher told me the results were positive, that I had passed, and that as far as he was concerned, I had proved I was telling the truth. He had added, however, that he could be overridden. When I pressed Ms. Durbin about the positive results on the second test, she repeated that as far as she was concerned, the results were inconclusive. This incident was just one more case of the OSC's inability to get their facts straight.

I was further disillusioned with the OSC when I was told by a colleague how the OSC handled the case of an anonymous officer whom I'll call "Officer A." Officer A was one of the "buddies" whom Wilson brought on after I left. But in the early part of 1987, they had a falling out. The following events are summarized from a discussion I had with the officer who sought my advice on how to help Officer A but who is afraid to reveal his identity, because he still works for the VA.

Officer A's wife worked at a Government facility in Puerto Rico. As one might expect, the distance caused strains on their marriage, strains so intense that I was told his wife threatened divorce if he didn't move closer, such as to Florida. Officer A asked Wilson for a transfer to a Florida VA hospital. Wilson, however, never came through with the transfer, and in fact failed to share a vacancy announcement for at least one Florida opening.

Officer A pleaded for emergency leave, but Wilson only gave him a final ultimatum: either forget about leaving to be near his wife, or resign from the VA. Wilson maintained that Officer A's personal life should not interfere with his job and that if it did interfere, he should resign.

Wilson then contributed to Officer A's stress from his wife's divorce threats by adding threats of his own. Wilson and an aide, Corporal Berry, began to leave messages on Officer A's answering machine, telling him to resign. Then, Wilson even entered Officer A's apartment with a spare key, took his T.V. set, and left him a note saying something to the effect: " I thought we were friends. You shouldn't have gone over my head to Mr. Sabin. I don't like it. Be in my office Monday with your resignation papers and $200 that you owe me." I was told that Officer A maintained he owes Wilson no money.

At this point, Officer A was completely at a loss for what to do, and my help was requested. I suggested that Officer A contact Vince Russell at the OSC, who was in Cincinnati at this time shortly after Congresswoman Schroeder's whistleblower hearings. According to my colleague, Russell took the tapes along with the note from Wilson. Russell then advised Officer A to resign and go to Florida. Further, Russell told Officer A that if he resigned "the OSC [would] take care of [him]." Unfortunately for Officer A, he took the OSC's advice, resigned, and sacrificed his legal rights. He then disappeared, and we cannot reach him. Is this how the OSC "takes care of you"? According to Ms. Durbin, the OSC wasn't supposed to give advice.

The most significant OSC misconduct may be that of misrepresenting the work of another government agency, the FBI. I am informed that the OSC has told Congress in briefings that the FBI did not support our whistleblowing charges. As mentioned before, the FBI told me just the opposite. Agent McDaniels said he believed he had basically substantiated our charges and forwarded the investigation to the Justice Department in Washington D.C. because it was a prosecutable case. There is not the slightest doubt in my mind that this is what the agent told me. Quite frankly, I wonder if it is time to give the OSC some lie detector tests.

I am pleased that I was vindicated personally through my settlement. However, I bitterly regret that men like Chief Wilson can ruin people's careers and go unchecked. Furthermore, I feel that the OSC is a grave threat to the whistleblowing effort, because it is like a wolf in sheep's clothing. It entices the needy whistleblower with hope and then kicks his legs out from under him. This made me personally feel very upset and sad with our system of justice today. Doesn't anyone care? To my knowledge, the OSC doesn't care, for it hasn't come to any conclusions or taken any kind of action. I'm told that the OSC can order the VA to conduct its own investigation, but the OSC hasn't. I am told the OSC is proud that through creative and informal negotiating and mediating, the Office avoids having to conduct hearings to protect whistleblowers. Yet as a result of the OSC's complete failure so far to help in any way a totally honest whistleblower like John Berter, who is still unemployed due to Chief Wilson's retaliatory action against him, the abuses at the Cincinnati VA hospital remain unchecked. Since I have already settled, I have nothing to gain for myself. I testify today only because I desire to help real public servants like Mr. Berter. The Office of the Special Counsel has offered him nothing but false hopes and misery.

STATEMENT BY JOSEPH D. WHITSON, JR. TO THE SENATE POST OFFICE AND CIVIL SERVICE SUBCOMMITTEE GIVEN JULY 20, 1987

PREFACE:

THANK YOU FOR THE CHANCE TO TESTIFY ON THE ISSUE OF PROVIDING GREATER PROTECTIONS FOR THOSE FEDERAL EMPLOYEES WHO SUFFER REPRISAL ACTIONS AFTER EXPOSING FRAUD, WASTE, AND ABUSE IN GOVERNMENT.

MY NAME IS JOSEPH DAVID WHITSON, JR. I WAS ONCE A SUPERVISORY CHEMIST AND CHIEF OF THE QUALITY CONTROL FUNCTION, LABORATORY SERVICES BRANCH, EPIDEMIOLOGY DIVISION, U.S. AIR FORCE SCHOOL OF AEROSPACE MEDICINE, BROOKS AFB, TEXAS. I HAD A BRIGHT FUTURE. THEN I WAS ORDERED BY A MILITARY JUDGE TO TESTIFY ABOUT THE DRUG ABUSE TESTING LABORATORY (DATL), WHICH WAS A PART OF THAT ORGANIZATION. WITHIN AN HOUR OF LEAVING THE WITNESS STAND, I LOST EVERYTHING.

MY STORY FOLLOWS. BEFORE I BEGIN THAT, I WOULD LIKE TO COMMENT ON THE AGENCIES THAT ARE SUPPOSED TO HELP WHISTLEBLOWERS. I REFER TO THE OFFICE OF THE SPECIAL COUNSEL (OSC) AND THE MERIT SYSTEMS PROTECTION BOARD (MSPB).

I DID NOT GO HOWLING TO THE PRESS WITH MY DISCLOSURES.

ON THE CONTRARY, I WAS GIVEN WHAT I BELIEVED TO BE A LAWFUL ORDER TO TESTIFY IN OPEN COURT BY A MILITARY JUDGE. UNDER THREAT OF PROSECUTION IF I REFUSED TO TESTIFY, I TOLD THE TRUTH. TO PARAPHRASE A FIGURE CURRENTLY IN THE PUBLIC EYE, I "TOLD IT ALL, THE GOOD, THE BAD, AND THE UGLY." I WAS ASSURED BY THE JUDGE THAT HE COULD PROTECT ME FROM CRUDE ACTS OF REPRISAL. HE FOUND--AT MY EXPENSE AND TO HIS SURPRISE--THAT HE COULD NOT. HE COMMENTED ABOUT THIS ON THE RECORD OF TRIAL.

BUT I WASN'T WORRIED. I WAS FAMILIAR WITH THE "CODE OF ETHICS OF GOVERNMENT SERVICE". REPRISAL WAS A PROHIBITED PERSONNEL PRACTICE. AND WHAT BETTER, MORE CREDIBLE WITNESS TO THE WHOLE THING THAN A MILITARY JUDGE! THERE WAS, IN WASHINGTON, AN AGENCY THAT RESCUED WHISTLEBLOWERS FROM THE MINIONS OF AGENCIES THAT TOOK REPRISAL ACTIONS AGAINST THOSE THAT EXPOSED FRAUD, WASTE, AND ABUSE IN GOVERNMENT. SURELY THIS AGENCY WOULD HELP ME. BOY, WAS I WRONG!

UNLIKE TODAY'S SO-CALLED "HEROES" TO WHOM THE LAW EXISTS ONLY AS AN INCONVENIENCE TO BE SUBVERTED, I COUNTED ON THE LAW FOR PROTECTION. I DID NOT SHREAD DOCUMENTS. I TRIED TO PRESERVE AS FULL OF AN AUDIT TRAIL AS POSSIBLE TO MAKE MY FATE MORE EASILY DOCUMENTED AND BETTER PROVE MY CASE.

THE AGENCY SHREADED NOT ONLY THE INCRIMINATING DOCUMENTS, BUT MY CAREER AS WELL. I WAS HARASSED, THREATENED PUBLICLY AND

PRIVATELY, RIDICULED BOTH OPENLY AND IN "CONFIDENTIAL" COMMUNICATIONS. MY NAME WAS SPREAD TO THE PRESS WITH VARIOUS "NEWS RELEASES" FROM BOTH THE AGENCY PUBLIC AFFAIRS OFFICES AND THROUGH PRIVATE DISCLOSURES FROM INDIVIDUALS WITHIN THE AGENCY. MY NAME AND SOCIAL SECURITY NUMBER WERE RELEASED TO MEMBERS OF THE LEGAL COMMUNITY. MY WIFE AND CHILDREN WERE THREATENED WITH BODILY HARM. WHERE WAS MY PROTECTION? THERE WAS NONE.

I FILED COMPLAINTS WITH BOTH THE OSC AND THE MSPB. BOTH AGENCIES TOOK INFORMATION I PROVIDED TO THEM AND SENT IT BACK TO THE AGENCY TO HELP THE AGENCY'S LAWYERS TRY AND BUILD A CASE AGAINST ME. ONE MEMBER OF THE BASE CIVILIAN PERSONNEL OFFICE, WHO I SAW AT LUNCH ONE DAY, SAID, "YEAH, WE ALWAYS KNOW WHEN YOU'VE SENT SOMETHING TO THE OSC OR THE MSPB OR WRITTEN TO THEM. IT SHOWS UP HERE WITHIN THE WEEK FOR OUR REBUTTAL AND FILING. YOU'RE ONLY HURTING YOURSELF BY WRITING TO THEM."

MY EXPERIENCES WITH THE OSC WERE A NIGHTMARE. I FINALLY TOOK A TRIP TO WASHINGTON TO LOOK INTO MATTERS FIRST-HAND AND MEET MY ELUSIVE "INVESTIGATOR". I WAS TOLD HOW UNDERPAID, OVERWORKED, UNDERSTAFFED, AND OVERBURDENED THEIR AGENCY WAS. PARTICULARLY TELLING WAS THE COMMENT BY MR VINCENT RUSSELL THAT, "EVERYBODY THINKS THEIR CASE IS THE MOST IMPORTANT. I HAVE A CLAIM IN WITH THE V(ETERAN'S) A(DMINISTRATION), AND WOULD LIKE FOR THEM TO ACT ON IT, BUT THEY ONLY HAVE SO MANY PEOPLE--JUST LIKE THE OSC DOES." A FEW WEEKS LATER I READ OF THEIR ASTONISHING SUCCESS EVISCERATING WHISTLEBLOWERS, AND KNEW BEYOND ANY DOUBT THAT I HAD BEEN HAD.

IT WAS THEN THAT I KNEW MY ONLY RELIEF--IF ANY--WOULD HAVE TO COME THROUGH THE COURTS. ONLY IN AN OPEN TRIAL BEFORE A JURY COULD I HOPE FOR AN IMPARTIAL HEARING OF MY CASE. IN SCIENCE, UNLIKE IN POLITICS, THERE IS NO "EXECUTIVE PRIVILEGE". I DIDN'T HAVE THE MONEY TO HIRE A WASHINGTON ATTORNEY TO CONTINUE THROUGH THE MSPB. AFTER SOME LEGAL RESEARCH, I RETAINED AN ATTORNEY TO FILE TWO LAWSUITS. I HOPE THAT THE RECORD OF THOSE TRIALS WILL DO WHAT THE OSC AND MSPB REFUSED TO DO...CLEAR MY NAME AND DEMONSTRATE THE VALIDITY OF MY CLAIMS.

WHEN THE "WHISTLE IS BLOWN", THE AGENCY MUST QUICKLY DO SEVERAL THINGS:

(1) THEY MUST APPEAR TO ACT WITHOUT REALLY ACTING. THIS IS ACCOMPLISHED THROUGH AN IMMEDIATE "IN-HOUSE INVESTIGATION" WHERE THE INVESTIGATORS ARE GIVEN PREWRITTEN CONCLUSIONS AND SENT OUT TO FIND WHATEVER FACTS THAT THEY CAN TO SUPPORT THE POSITION OF THE AGENCY.

(2) THE WHISTLEBLOWER MUST BE DISCREDITED, AND PORTRAYED AS THE SOURCE OF THE PROBLEM IF POSSIBLE. THIS IS USUALLY DONE BY BRINGING IN SOMEONE FROM OUTSIDE THE AGENCY TO ATTACK THE WHISTLEBLOWER'S MOTIVES, INTEGRITY, IN SOME CASES SANITY, AND QUALIFICATIONS. THERE ARE PLENTY OF "HAVE PhD - WILL TRAVEL" TYPES

AVAILABLE FOR A MODEST FEE. THESE PEOPLE CAN THEN BE RETAINED AS CONSULTANTS FOR FUTURE NEEDS IN THIS AREA. LIKE MR PHELPS OF MISSION IMPOSSIBLE, IF THEY ARE CAUGHT OR CAPTURED, THE AGENCY WILL DISAVOW ANY KNOWLEDGE OF THEM OR THEIR MISSION.

(3) FINALLY, THE WHISTLEBLOWER MUST BE SILENCED. THIS IS USUALLY ABETTED THROUGH THE U.S. ATTORNEY'S OFFICE. THE U.S. ATTORNEY IS ALWAYS MUCH MORE INTERESTED IN HOW DOCUMENTS WERE OBTAINED THAN WHAT THEY SAY. GENERALLY, A THREAT OF PROSECUTION FOR EITHER STEALING THE DOCUMENTS THEMSELVES OR THE COPIER PAPER AND SUPPLIES WILL SERVE TO SILENCE THE OFFENDING PARTY.

(4) THE AGENCY'S PUBLIC AFFAIRS OFFICE THEN ISSUES A FEW NEWS RELEASES WHICH FINALIZE THE DAMAGE TO THE WHISTLEBLOWER. OF COURSE, HE/SHE CANNOT RESPOND PUBLICLY TO THESE CHARGES, LEST THE U.S. ATTORNEY MAKE GOOD ON THREATS OF PROSECUTION FOR OBTAINING GOVERNMENT DOCUMENTS IN AN UNAUTHORIZED FASHION. I UNDERSTAND THAT THE AIR FORCE HAS AN EVEN BETTER TRICK NOW...THEY CLASSIFY PREVIOUSLY UNCLASSIFIED DOCUMENTS AFTER THEY HAVE BEEN RELEASED. THEN THEY CAN ATTACK THE PERSON WHO RELEASED THE MATERIAL.

THE OSC HELPS DESTROY THE WHISTLEBLOWER BY ASSISTING THE AGENCY AND THEN "BLESSING" ANY REPRISAL ACTIONS TAKEN BY THE AGENCY. THIS IS DONE BY FUNNELING INFORMATION SENT TO THE OSC UNDER GUISE OF CONFIDENTIALITY BACK TO THE AGENCY FOR THEIR COMMENT AND RETENTION. IF AN OUTSIDE AGENCY/AUTHORITY IS NEEDED AS IN (2) ABOVE, THE OSC SERVES THIS PURPOSE. THEN, WHEN THE WHISTLEBLOWER HAS BEEN BLED OF INFORMATION, THE OSC PRONOUNCES THAT EITHER:

(A) NO REPRISAL ACTIONS WERE TAKEN, OR

(B) THE CLAIM WAS NOT "MERITORIOUS"--OR NOT "TIMELY FILED", OR AND, JUDGING FROM THEIR RECORD, THEIR FAVORITE:

(C) THEY HAVE NO JURISDICTION IN THE MATTER.

THE LAST IS ALSO THE MOST DANGEROUS TO THE WHISTLEBLOWER, SINCE IT TURNS THE MATTER BACK TO THE AGENCY FOR "FINAL reSOLUTION". THE AGENCY HAS THE BENEFIT OF THE INSIGHTS OF THE OSC AS WELL AS INFORMATION THAT THE WHISTLEBLOWER HAS COLLECTED FROM HIM.

I LEARNED THE DIFFERENCE BETWEEN DUTIES ON PAPER AND THE REAL DUTIES OF GOVERNMENT SERVICE. I REPORTED VIOLATIONS OF LAW OUT OF RESPECT FOR THE LAW AND "THE SYSTEM". I ACTUALLY BELIEVED I HAD AN OBLIGATION TO THE TAXPAYERS. IN THE REAL WORLD OF CIVIL SERVICE, NOTHING COULD BE FURTHER FROM THE TRUTH. THE ONLY DUTY WITHIN THE FEDERAL CIVILIAN OR MILITARY SERVICE IS TO PROTECT ONES BOSS AND THE SYSTEM. A CONTINUING EROSION OF PROTECTIONS AND REMEDIES HAS RESULTED IN DE FACTO EMPLOYMENT AT WILL IN MANY AGENCIES, ESPECIALLY IN THE MILITARY.

I URGE YOU TO CUT OFF FUNDING FOR THE SPECIAL COUNSEL AND THE

MERIT SYSTEMS PROTECTION BOARD. THEY ARE WORSE THAN NO HOPE AT ALL FOR THE WHISTLEBLOWER...THEY ARE FALSE HOPE. IT WOULD BE BETTER TO KNOW AT THE OUTSET THAT THE AGENCY CAN AND WILL DO WHATEVER IT WANTS WITHOUT THE EXERCISE IN FUTILITY OF HOPE AGAINST HOPE FOR RELIEF.

IF YOU ARE GOING TO HAVE AN AGENCY TO ASSIST WHISTLEBLOWERS, IT SHOULD BE COMPOSED OF EX-WHISTLEBLOWERS. THEY HAVE BEEN EFFECTIVELY RUINED IN THEIR CHOSEN PROFESSIONS BY THE AGENCIES AND HAVE ACTUAL EXPERIENCE IN GATHERING EVIDENCE. THEY WOULD BE A VALUABLE, YET UNTAPPED ASSET. MOST HAVE NO LAW DEGREE NOR FORMAL TRAINING, YET HAVE GONE HEAD TO HEAD WITH THE AGENCY'S LEGAL PERSONNEL AND ACQUITTED THEMSELVES WITH HONOR.

I HAVE RECEIVED CALLS FROM FORMER COWORKERS, MANY IN TEARS, APOLOGIZING FOR THEIR LACK OF COURAGE IN NOT COMING FORWARD AND REINFORCING THE VALIDITY OF MY DISCLOSURES. THE USUAL EXCUSE IS THAT THEY HAVE A FAMILY TO SUPPORT AND CAN'T GET INVOLVED OR RISK REPRISAL. THEY'VE SEEN WHAT THE AGENCY HAS DONE. THEY'VE ALSO SEEN THAT THE AGENCY HAS GOTTEN AWAY WITH WHATEVER IT WANTS, AND THUS DARE NOT TAKE ANY RISK.

I HAVE YET TO MEET A WHISTLEBLOWER--USING THE GOVERNMENT'S OWN DEFINITION OF SUCH--WHOSE CLAIM WAS FRIVOLOUS OR WITHOUT MERIT. COMING FORWARD REQUIRED A GREAT DEAL OF SOUL-SEARCHING ON MY PART. MY FAMILY HAS PAID MUCH OF THE PRICE OF THIS ACTION.

I HAVE INCLUDED VERY FEW EXHIBITS WHICH GIVE YOU A FLAVOR OF WHAT HAPPENED. MOST OF WHAT IS ENUMERATED WAS OBTAINED BY DIRECT RELEASE OR THROUGH LEGAL DISCOVERY MEANS. THE REST ARE PUBLICATIONS OR PUBLIC DOCUMENTS.

AS I TELL MY STORY, PLEASE ASK YOURSELVES THESE QUESTIONS:

1. IF MR WHITSON WAS THE ONLY PROBLEM, WHY WAS THE LAB DECERTIFIED?

2. WHY DID IT TAKE THE LAB FROM JUNE 7, 1984, UNTIL JANUARY, 1987, TO BECOME RECERTIFIED---AND THEN ONLY FOR ONE DRUG, WHEN THEY HAD BEEN TESTING FOR 6 DRUGS BEFORE?

IF TIME PERMITTED, I WOULD SPEAK TO THE ISSUE OF THE MANY ABUSES OF THE DRUG TESTING PROGRAM. COMMANDERS CALLED WITH SOCIAL SECURITY NUMBERS. THEY WOULD SAY THAT THEY "KNEW THIS INDIVIDUAL IS ON DRUGS. (HE/SHE) IS A SUBSTANDARD PERFORMER BUT IT WILL TAKE ME SO LONG TO USE ADMINISTRATIVE CHANNELS TO GET RID OF HIM/HER...CAN'T YOU FIND SOMETHING IN THAT SAMPLE 'FOR THE GOOD OF THE SERVICE'?"

THERE WERE THE SPECIAL LISTS OF SOCIAL SECURITY NUMBERS THAT WE WERE TOLD WERE ALWAYS TO BE REPORTED AS "CLEAN", REGARDLESS OF WHAT WAS FOUND IN THEM. THERE WERE EVEN CASES OF LAB PERSONNEL

FOUND THROUGH NORMAL INVESTIGATIVE PROCEDURES SELLING DRUGS AND THEN "FIXING" THE TEST RESULTS. ACCORDING TO A RECENT ARTICLE IN THE CHEMICAL AND ENGINEERING NEWS, THIS ALSO TAKES PLACE IN THE CIVILIAN COMMUNITY.

SINCE SUCH IS THE CASE, SUCH AS IN THE CURRENT CONRAIL AND FAA DRUG TESTING CONTROVERSIES, NONE OF WHAT I'VE SAID SHOULD BE SURPRISING.

STATEMENT OF JOSEPH D. WHITSON, JR.

MY PURPOSE IN OFFERING THIS TESTIMONY IS TO EXPRESS MY PERSONAL KNOWLEDGE AND CONCERNS THAT THE MANAGEMENT OF LABORATORY SERVICES BRANCH OF THE UNITED STATES AIR FORCE SCHOOL OF AEROSPACE MEDICINE ("USAF-SAM") AT BROOKS AIR FORCE BASE IN SAN ANTONIO, TEXAS, HAS SYSTEMATICALLY SUPPRESSED INFORMATION REGARDING THE LACK OF QUALITY CONTROL AND FORENSIC RELIABILITY OF LABORATORY MACHINERY AND PROCEDURES IN THE AIR FORCE DRUG ABUSE TESTING LABORATORY. IT IS MY BELIEF, BASED ON PUBLICATIONS AND CONVERSATIONS WITH PERSONS PRESENTLY ASSIGNED TO THAT FACILITY, THAT THESE PRACTICES CONTINUE TO THIS DAY. IN THE PROCESS, THOSE WHO HAVE DEFENDED RIGOROUS STANDARDS OF QUALITY CONTROL AND FORENSIC RELIABILITY HAVE FACED PRESSURE, INTIMIDATION AND RETALIATION WHICH STRIPPED THEM OF THE AUTHORITY TO FUNCTION AS VIABLE MEMBERS OF THE LABORATORY MANAGEMENT TEAM. I AM AMONG THOSE WHO HAVE SUFFERED THIS FATE. MY PERSONAL EFFORTS TO EXPOSE THE COVER-UP ACTIVITIES OF SUPERVISORY MILITARY OFFICERS AT THE LABORATORY THROUGH THE AGENCIES ESTABLISHED TO PROTECT EMPLOYESS AGAINST WHOM REPRISALS HAVE BEEN TAKEN -- INCLUDING THE AIR FORCE GRIEVANCE APPEAL BOARD, THE U.S. MERIT SYSTEMS PROTECTION BOARD ("MSPB"), AND THE OFFICE OF THE SPECIAL COUNSEL ("OSC") -- HAVE BEEN MISHANDLED AND VIRTUALLY IGNORED BY THOSE AGENCIES, AS FULLY SET FORTH BELOW.

1. I HAVE BEEN AN EMPLOYEE OF THE FEDERAL GOVERNMENT FOR THE PAST TEN YEARS. FROM 1976 TO 1983, I WAS EMPLOYED WITH THE UNITED STATES POSTAL SERVICE (1976 TO 1979, U.S. POSTAL SERVICE; 1979-1983, U.S. ARMY; 1983 USPS).

2. IN JULY 1983, I APPLIED THROUGH THE OFFICE OF PERSONNEL MANAGEMENT RECRUITING CENTER OF SAN ANTONIO, TEXAS, FOR THE POSITION OF CHEMIST AT BROOKS AIR FORCE BASE. MY INTEREST IN THIS POSITION STEMS FROM MY TRAINING.

3. ON SEPTEMBER 18, 1983, I WAS LATERALLY TRANFERRED FROM THE POSTAL SERVICE IN HOUSTON, TEXAS TO THE CIVIL SERVICE TO A GS-9 POSITION OF SUPERVISORY CHEMIST AT THE AEROSPACE MEDICAL DIVISION (AIR FORCE SYSTEMS COMMAND), USAF SCHOOL OF AEROSPACE MEDICINE, EPIDEMIOLOGY DIVISION, LABORATORY SERVICES BRANCH, DRUG ABUSE TESTING LABORATORY SECTION, QUALITY CONTROL FUNCTION. I WAS

CONTACTED IN AUGUST AND OFFERED THE POSITION OF SUPERVISORY CHEMIST AS CHIEF OF THE QUALITY CONTROL UNIT OF THE AIR FORCE - DRUG LABORATORY. I FOUND IT ODD THAT I WAS NEVER INTERVIEWED FOR THE JOB, BUT IT SOUNDED LIKE A CHALLENGING OPPORTUNITY FOR WHICH I WAS WELL QUALIFIED, SO I ACCEPTED.

4. FROM OCTOBER 31 THROUGH NOVEMBER 5, 1983, SHORTLY AFTER I WAS HIRED AS SUPERVISORY CHEMIST, A WHITE HOUSE BLUE RIBBON PANEL, KNOWN AS THE EINSEL COMMISSION, INSPECTED THE DRUG ABUSE TESTING DETECTION LABORATORY ("DATL" OR "LABORATORY"). ACCORDING TO THEIR INSPECTION REPORT, ISSUED DECEMBER 1983, THE EINSEL COMMISSION RATED THE LABORATORY'S QUALITY CONTROL PROGRAM AS THE BEST THEY HAD INSPECTED IN THEIR TOUR OF ALL DEPARTMENT OF DEFENSE ("DOD") DRUG LABORATORIES, AND MADE NO MENTION OF QUALITY CONTROL DEFICIENCIES. THEY ASSESSED THE BROOKS AIR FORCE BASE LABORATORY AS THE BEST DOD DRUG LABORATORY OVERALL. THEIR DESCRIPTION USED SUCH PHASES AS "MODEL PROGRAM" IN REFERRING TO THE QUALITY CONTROL FUNCTION AND ITS ACTIVITIES.

5. IN NOVEMBER 1983, AFTER THE EINSEL COMMISSION INSPECTION TOUR, I WAS DIRECTED BY MY SUPERVISOR, LOUIS E. BLOUSE, JR., PH.D., CHIEF OF THE LABORATORY SERVICES BRANCH/EPIDEMOLOGY DIVISION, TO WRITE A PLAN CONSOLIDATING THE QUALITY CONTROL FUNCTIONS FOR THE DATL, WITH THOSE OF THE LABORATORY SERVICES DIVISION, IN WHICH I WAS TO BE ASSIGNED RESPONSIBILITY FOR QUALITY CONTROL RELATED TO THE ENTIRE LABORATORY SERVICES DIVISION BRANCH. THIS NEW RESPONSIBILITY EFFECTIVELY DOUBLED MY OWN WORKLOAD AND THAT OF THE OTHER PERSONNEL UNDER MY SUPERVISION. IN DECEMBER 1983, THE CONSOLIDATION PLAN I DRAFTED WAS APPROVED BY MY SUPERVISOR, DR. BLOUSE AND BY THE EPIDEMIOLOGY DIVISION CHIEF, COLONEL GEORGE D. LATHROP. THIS DRAFT WAS SENT TO THE MANPOWER EVALUATION TEAM, DETACHMENT 26, WITHOUT ANY CHANGES FOR REVIEW, APPROVAL, AND IMPLEMENTATION.

6. IN JANUARY 1984, THE PERSON ACTING AS CLINICAL QUALITY CONTROL CHIEF, A MILITARY POSITION, WAS TRANSFERRED OUT OF THE DIVISION, AND MY SUPERVISORS ASSIGNED ME TO TAKE OVER FULL RESPONSIBILITY FOR QUALITY CONTROL FOR THE LABORATORY SERVICES BRANCH UNDER THE TITLE OF CHIEF OF QUALITY CONTROL OF THE DRUG ABUSE TESTING LABORATORY. BECAUSE OF THE ADDED FULFILLMENT OF THE RESPONSIBILITIES AS CHIEF OF QUALITY CONTROL, I WILLINGLY TOOK OVER THE GREATLY INCREASED DUTIES AND WORKLOAD DESPITE THE FACT THAT MY NEW POSITION DID NOT RESULT IN A PAY RAISE OR PROMOTION. ONE OF THE REPORTS DIRECTED BY THE AIR FORCE IN THE WAKE OF MY DISCLOSURES MENTIONS THAT THE QC DUTIES OF THE DATL ALONE WERE AT LEAST OF THE LEVEL OF RESPONSIBILITY OF A GS-13. THE ADDITIONAL DUTIES WERE NOT ADDRESSED. THIS WAS PART OF MY BASIS FOR MY LATER COMPLAINT OF CONSTRUCTIVE REDUCTION IN GRADE TO THE MSPB.

7. DURING JANUARY 1984, I RECEIVED A SUPERVISORY APPRAISAL FROM CAPTAIN EDWARD J. BROWN, ASSISTANT CHIEF OF THE DRUG ABUSE DETECTION LABORATORY, IN WHICH I SCORED A 5.0 PERFORMANCE RATING

ON A MAXIMUM SCALE OF 5.0. THE APPRAISAL OCCURRED DURING THE SAME MONTH THAT CPT BROWN HAD BEEN CERTIFIED AS A READER OF CHROMATOGRAMS FOR THE "WHITE HOUSE RETROSPECTIVE REVIEW" BY ROBERT K. SIMON, PhD, AND MAHMOUD A. ELSOHLY, PhD, BOTH CIVILIANS HIRED BY THE LABORATORY AS CONSULTANTS. AS A RESULT OF THE REVIEW PERFORMED BY CPT BROWN AND THE THREE OTHER MEMBERS OF THE REVIEW TEAM, OVER SIX THOUSAND SIX HUNDRED AND SIXTY SIX PERSONS WERE IDENTIFIED AS HAVING BEEN VICTIMIZED BY SCIENTIFICALLY-INSUFFICIENT AND UNSUPPORTABLE DRUG TESTING EVIDENCE IN ADVERSE IN PERSONNEL ACTIONS.

8. ALSO IN JANUARY 1984, CPT BROWN FORMULATED IN WRITING AN INDIVIDUAL DEVELOPMENT PLAN AND A JOB PERFORMANCE ELEMENTS (JOB DESCRIPTION) FOR MY WORK AS CHIEF OF QUALITY CONTROL, AND RECOMMENDED THAT I BE TAKEN OFF PROBATIONARY STATUS AND MADE A FULL SUPERVISORY CHEMIST. THE WRITTEN PLAN AND JOB DESCRIPTION "DISAPPEARED" FROM MY PERSONNEL FILE AT SOME TIME DURING THE NEXT YEAR.

9. IN FEBRUARY 1984, MY SUPERVISORS IN THE LABORATORY SERVICES BRANCH GAVE ME TWO SPECIFIC ASSIGNMENTS THAT LED TO REPRISAL ACTION AGAINST ME. FIRST, BY LETTER, DR. BLOUSE DIRECTED ME TO PERFORM AN IN-HOUSE INSPECTION AS REQUIRED BY THE COLLEGE OF AMERICAN PATHOLOGISTS. SECOND, I WAS DIRECTED TO DRAFT A COMBINED ARMY/AIR FORCE DRUG TESTING MANUAL FOR USE IN ALL DOD LABORATORIES.

10. DURING FEBRUARY 1984, I PERFORMED SCIENTIFIC EXPERIMENTS WHICH CONFIRMED INFORMATION GENERATED FROM FINDINGS AT THE U.S. ARMY WIESBADEN, GERMANY, LABORATORY INDICATING THAT POPPY SEEDS USED IN BAKING CAN, IF INGESTED, SHOW POSITIVE TEST RESULTS FOR MORPHINE (OPIATES). THERE HAD ALSO BEEN REPORTS AT THIS TIME THAT THE U.S. NAVY DRUG LABORATORIES HAD ORDERED RANDOM DRUG SCREENING TO EXCLUDE TESTS FOR OPIATES BECAUSE OF THE POTENTIAL FOR FALSE POSITIVES. I REPORTED MY INDEPENDENT FINDINGS TO MY SUPERVISOR, DR. BLOUSE. HIS RESPONSE WAS TO ORDER THAT ALL INFORMATION ABOUT MY EXPERIMENTS BE COVERED UP AND THAT ALL ORIGINAL FILES RELATED TO THESE TESTS BE BROUGHT TO HIS OFFICE. AT THIS TIME, I WAS AWARE THAT LIEUTENANT COLONEL JAMES COLLINS, CHIEF OF TOXICOLOGY, HAD ALSO CONFIRMED THAT POPPY SEEDS PRODUCE MORPHINE PEAKS IN DRUG TESTS, AND WAS INSTRUCTED BY DR. BLOUSE NOT TO MENTION HIS STUDIES TO ANYONE. (LTC COLLINS WAS LATER TRANSFERRED OUT OF BROOKS AFB.)

11. IN EARLY MARCH 1984, THE 400-PAGE DRAFT DATL LABORATORY MANUAL I HAD PREPARED AS DIRECTED BY DR. BLOUSE WAS DELIVERED TO THE MEDICAL EDITING DIVISION. THE MANUAL WAS RETURNED TWO WEEKS LATER WITH NO MAJOR CORRECTIONS, AND COMMENTS THAT INDICATED IT "WAS VERY READABLE AND EASILY FOLLOWED." THE MANUAL HAD BEEN EDITED TO CONFORM TO REGULATION FORMAT, THAT IS, NUMBERED PARAGRAPHS, SECTION SEPARATIONS AND CAPITALIZATION, ETC. REFERENCES CITING SCIENTIFIC SOURCES, AS REQUIRED BY THE COLLEGE OF AMERICAN PATHOLOGISTS GUIDELINES, WERE DELETED BY THE EDITORS.

12. LATER DURING THE MONTH OF MARCH 1984, I WAS CONTACTED OVER THE TELEPHONE BY CAPTAIN LINDSAY GRAHAM, CIRCUIT DEFENSE COUNSEL ("CDC"), WHO WAS REPRESENTING CAPTAIN EDWARD PEARSON IN AIR FORCE COURT-MARTIAL PROCEEDINGS BASED ON CHARGES STEMMING FROM A POSITIVE DRUG TEST. (CPT PEARSON'S CASE LATER BECAME THE SUBJECT OF A "60 MINUTES" TELEVISION BROADCAST.) MY SUPERVISORS WERE AWARE THAT CPT GRAHAM WAS CONTACTING THE LABORATORY AS PART OF HIS INVESTIGATION OF THE CASE, BECAUSE THAT SAME AFTERNOON, I WAS ORDERED (a) TO TELL THE COURT-MARTIAL PROSECUTORS EVERYTHING I HAD DISCUSSED WITH CPT GRAHAM, (b) TO SIGN TWO AFFIDAVITS, ONE THAT GAVE ALL DETAILS OF CPT GRAHAM'S CALL AND A SECOND AFFIDAVIT TO THE EFFECT THAT I GAVE THE PROSECUTORS A FULL ACCOUNT OF THE DISCUSSIONS WITH DEFENSE COUNSEL, LEAVING NOTHING OUT, AND (c) TO WRITE A MEMORANDUM FOR RECORD TO COLONEL JEFFREY DAVIS, VICE COMMANDER OF THE SCHOOL OF AEROSPACE MEDICINE, GIVING ALL THE DETAILS OF THE TELEPHONE CONVERSATION WITH DEFENSE COUNSEL. LATER THE SAME AFTERNOON, I WAS CONTACTED BY CAPTAIN SUCHENSKI, THE PROSECUTOR IN CPT PEARSON'S CASE; I WAS NEVER TOLD TO PUT ANYTHING IN WRITING ABOUT MY CONVERSATION WITH HER. SHE REQUIRED A COMPLETE DISCUSSION OF ALL INFORMATION GIVEN TO OR DISCUSSED WITH THE DEFENSE ATTORNEY, CPT GRAHAM.

13. ON MARCH 22, 1984, A STAFF MEETING OF ALL LABORATORY PERSONNEL WAS HELD AT ABOUT 8:00 A.M. AMONG THE SEVERAL ITEMS DISCUSSED, SUPERVISORS MENTIONED THE NAMES OF THREE LABORATORY EMPLOYEES, INCLUDING TWO FORMER LABORATORY CHIEFS (WHO HAVE SINCE RESIGNED FROM THE AIR FORCE), WHOSE TESTIMONY IN COURT-MARTIAL PROCEEDINGS HAD REFLECTED NEGATIVELY ON THE DATL. THE STAFF WAS TOLD THAT THE LABORATORY COMMANDER WOULD USE HIS "CHANNELS" TO BRING PERJURY CHARGES AGAINST MY EMPLOYEES FOUND TO HAVE MADE STATEMENTS TO ANYONE THAT COULD BE USED AGAINST THE LABORATORY. HE SAID THAT PERJURY AND DERILECTION OF DUTY CHARGES WERE BEING BROUGHT AGAINST BOTH INDIVIDUALS, AT HIS INSISTANCE.

14. FROM MARCH 26 THROUGH MARCH 30, 1984, THE LABORATORY UNDERWENT A MID-CYCLE IN-HOUSE INSPECTION AS REQUIRED BY THE COLLEGE OF AMERICAN PATHOLOGISTS. IN A LETTER SIGNED BY DR. BLOUSE, I WAS APPOINTED TO HEAD THE INSPECTION TEAM, WHICH ALSO INCLUDED CPT BROWN AS THE REPORTING OFFICIAL. ON MARCH 30, 1984, CPT BROWN AND I REPORTED THE RESULTS OF THE CAP INSPECTION TO DR. BLOUSE. DR. BLOUSE BECAME VERY UPSET AT THE NUMBER OF DEFICIENCIES IN THE DRUG TESTING LABORATORY THAT HAD BEEN IDENTIFIED BY THE INSPECTION TEAM. IN RESPONSE, DR. BLOUSE TELEPHONE COL JULIO E. ACEVEDO, THE CAP ADVISOR STATIONED AT WILFORD HALL USAF MEDICAL CENTER, AND ARRANGED A MEETING FOR THE FOLLOWING MONDAY AFTERNOON, APRIL 2, 1984. DR. BLOUSE TOLD ME WHEN HE MADE THE PHONE CALL TO COL ACEVEDO THAT THIS MEETING WAS PURPOSELY SCHEDULED TO EXCLUDE CPT ED BROWN AND CPT DANIEL MAHON. BOTH OF THESE GENTLEMEN WOULD BE ON TEMPORARY DUTY (TDY) THAT DAY, AND HAD CONDUCTED CAP INSPECTIONS AT OTHER FACILITIES.

15. ON APRIL 2, 1984, DR. BLOUSE AND COL ACEVEDO MET WITH ME

TO DISCUSS THE CAP INSPECTION REPORT. DURING THIS MEETING, DR. BLOUSE DECLARED THAT "WE CAN'T LIVE WITH THIS HIGH A NUMBER OF DEFICIENCIES." HE ORDERED ME TO CHANGE OVER 50 DEFICIENCIES TO REFLECT COMPLIANCE WITH CLINICAL STANDARDS WHEN, IN FACT, SUCH WAS NOT THE CASE.

16. DURING APRIL 1984, DEFENSE ATTORNEYS LIEUTENANT COLONEL ROBERT REED AND CPT GRAHAM REQUESTED A MEETING WITH ALL LABORATORY PERSONNEL FOR THE PURPOSE OF SETTING UP INTERVIEWS.

17. THE EVENING PRIOR TO THEIR ARRIVAL AT ABOUT 2:30 P.M., LTC ALAN ERNST, THE BASE STAFF JUDGE ADVOCATE CALLED A MEETING OF LABORATORY PERSONNEL. ONLY PERSONNEL SPECIFICALLY REQUESTED BY THE DEFENSE ATTORNEYS WERE CALLED TO THE MEETING. THE SUBSTANCE OF THE MEETING WAS THAT PERSONNEL WERE "ENCOURAGED" TO SPEAK WITH THE DEFENSE COUNSEL, BUT IF THEY DID SPEAK, IT WOULD BE VIEWED BY LAB MANAGEMENT OFFICIALS AS VOLUNTEERING INFORMATION AGAINST THE LABORATORY AND THE INTERVIEWED WOULD BE SUBJECTED TO ADMINISTRATIVE EMPLOYEE ACTION FOR MAKING A FALSE OFFICIAL STATEMENT IF ANY INFORMATION THAT WAS "VOLUNTEERED" COULD BE VIEWED BY SUPERVISORS AS NOT BEING "PRO-LAB."

18. LATER IN APRIL 1984, MANDATORY ATTENDANCE OF ALL DATL PERSONNEL WAS REQUIRED FOR A STAFF MEETING AT WHICH COL LATHROP, CHIEF OF EPIDEMIOLOGY DIVISION, POUNDED HIS FISTS ON A TABLE AND LITERALLY SCREAMED OUT THAT "THERE IS NO (EXPLETIVE) [GOD-DAMNED] COMMAND INFLUENCE IN THIS DIVISION, AND IF ANYONE THINKS THERE IS, I'LL HAVE HIM OR HER TRANSFERRED." COL LATHROP ALSO READ EXCERPTS FROM AN AFFIDAVIT SIGNED BY AMN BERNAISCHE WHO HAD BEEN INTERVIEWED BY DEFENSE ATTORNEYS. IT WAS CLEAR TO SEVERAL PERSONNEL THAT APPROACHED ME THAT WERE PRESENT AT THE MEETING THAT IF AN EMPLOYEE GAVE A WITNESS AFFIDAVIT CONCERNING DRUG TESTING PROCEDURES FOR USE IN COURT PROCEEDINGS, THE PROSECUTORS IN THE LEGAL OFFICE WOULD OBTAIN A COPY AND FORWARD IT TO THE DIVISION CHIEF. THIS WAS CONFIRMED IN TESTIMONY IN U.S. VS HODGES AND RICHARDSON. ALSO IN ATTENDANCE AT THIS MANDATORY STAFF MEETING WERE DR. BLOUSE AND CAPTAIN DANA LINDSAY, JAG, OF THE LEGAL OFFICE.

19. ON APRIL 12, 1984, DR. BLOUSE AND MAJOR FREDDIE DAVIS, CHIEF OF DATL, SIGNED JPAS/CPAS RATINGS OF MY PERFORMANCE ON WHICH I WAS SCORED AT 8.52 ON A 9.00 SCALE, AND GIVEN A "SUPERIOR" OVERALL RATING. DURING APRIL, MAJOR DAVIS ALSO ISSUED SUPERVISORY RATINGS OF MY PERFORMANCE, SCORING ME AT 4.9 ON A 5.0 SCALE, BUT DID NOT MAKE A RECOMMENDATION FOR OR AGAINST GRANTING ME FULL SUPERVISORY STATUS.

20. ON MAY 5, 1984, DR. BLOUSE ORDERED ME TO GIVE HIM ALL DOCUMENTS I WAS MAINTAINING ON VARIOUS PROBLEMS IN THE LABORATORY. HE HAD BEEN SERVED WITH AN ORDER TO PRODUCE QUALITY CONTROL DOCUMENTS, AND WANTED TO REVIEW ALL DOCUMENTATION PRIOR TO PRODUCING ANYTHING THAT MIGHT BE--TO USE THEIR TERM--MISUSED IN

THE COURTS. THE DOCUMENTS INCLUDED MY RECORDS ON MACHINE MALFUNCTIONS AND OTHER PROBLEMS AND A LIST OF SAMPLES THAT MIGHT HAVE BEEN AFFECTED BY THOSE PROBLEMS; STANDARD OPERATING PROCEDURES ("SOPs"), WHICH WERE INSTRUCTIONS AND FORMULAS FOR PERFORMING DRUG TESTS; AND VARIOUS MEMORANDA FOR RECORD IN WHICH THE STAFF IDENTIFIED MISTAKES IN TESTING PROCEDURES IN THE LABORATORY, THE STEPS TAKEN TO CORRECT THE MISTAKES, AND THE SAMPLES WHICH MAY HAVE BEEN AFFECTED BY THE MISTAKES. THESE DOCUMENTS WERE DELIVERED TO DR. BLOUSE THE SAME AFTERNOON, AND WERE KEPT IN HIS OFFICE IN A FILE THAT LATER BECAME KNOWN AS THE "OUT OF CONTROL FILE."

21. DURING THE WEEK OF MAY 7-11, 1984, DR. BLOUSE, ORDERED ME TO SPEAK WITH TWO TEAMS OF LAWYERS FROM THE LEGAL OFFICE ABOUT THE LABORATORY AND MY JOB THERE. DR. BLOUSE WARNED ME NOT TO DISCUSS ANYTHING THAT I DID NOT HAVE "DIRECT KNOWLEDGE AND PROOF OF." I ASKED HIM IF THAT MEANT I SHOULD MAKE COPIES OF ANY DOCUMENTS TO SUPPORT WHAT I MIGHT SAY. HIS REPLY WAS, "NO, JUST DON'T TELL THEM ANYTHING." ON MAY 11, 1984, I ASKED ONE OF THE LAWYERS, LIEUTENANT COLONEL ERNST (JAG) IF THERE WERE ANY PROBLEMS WITH THE DOCUMENTS IN THE "OUT OF CONTROL FILE." HE RESPONDED THAT HE AND DR. BLOUSE HAD GONE OVER THE DOCUMENTS, HAD FOUND NOTHING WRONG WITH THEM, AND HAD DETERMINED THAT THEY AMOUNTED MERELY TO DOCUMENTATION OF THE LABORATORY'S QUALITY CONTROL ("QC") PROGRAM.

22. ON MAY 14, 1984, COL LATHROP CALLED ME TO HIS OFFICE FOR A COUNSELING MEETING. DR. BLOUSE WAS NOT PRESENT FOR THIS MEETING ALTHOUGH, (a) HE WAS MY OFFICIAL SUPERVISOR, AND (b) WAS PRESENT FOR DUTY THAT DAY. COL LATHROP STATED TO ME THAT, BY SPEAKING WITH THE LAWYERS, I HAD RELEASED INFORMATION ABOUT THE LABORATORY IN UNAUTHORIZED FASHION. I TOLD HIM THAT DR. BLOUSE HAD ORDERED ME TO SPEAK WITH THESE ATTORNEYS. WHEN I ASKED DR. LATHROP IF ANYTHING I HAD SAID TO THE LAWYERS WAS CONSIDERED CONFIDENTIAL MATERIAL, HE REPLIED "THAT IS NOT THE POINT." HE ALSO STATED THAT IF I DIVULGED TO ANYONE THE FACT THAT HE HAD COUNSELED ME, HE WOULD TAKE FURTHER STEPS AGAINST ME. HE SAID THAT HE WAS GOING TO ARRANGE TO HAVE MY TELEPHONE CALLS MONITORED AND RECORDED. HE DID NOT STATE WHETHER THIS MONITORING WAS TO BE OF MY OFFICE PHONE, HOME PHONE, OR BOTH.

23. ON MAY 15, 1984, AT 10:00 A.M., I WAS SUMMONED TO COL LATHROP'S OFFICE TO SIGN A COUNSELING STATEMENT. THIS WAS HIGHLY UNUSUAL BECAUSE DR. BLOUSE WAS MY SUPERVISOR AND HAD NEVER COUNSELED ME ON ANYTHING, AND YET HIS SUPERVISOR, COL LATHROP, WAS PUTTING IN WRITING THE COUNSELING SESSION HE HAD CALLED.

24. ON MAY 15, 1984, AT ABOUT 11:00 A.M., SENIOR MASTER SERGEANT BRELL, THE NON-COMMISSIONED OFFICER IN CHARGE OF THE LABORATORY DIVISION WHO REPORTS DIRECTLY TO DR. BLOUSE, ASKED ME TO SPEAK WITH DEFENSE ATTORNEY CPT GRAHAM. I TOLD SMS BRELL THAT I COULD NOT SPEAK WITH CPT GRAHAM BECAUSE I WAS UNDER COL LATHROP'S ORDERS NOT TO SPEAK WITH ANYONE FROM THE "LEGAL

COMMUNITY".

25. ON MAY 15, 1984, AT 12:30 P.M., I WAS CALLED TO COL LATHROP'S OFFICE AND HE ORDERED ME TO SPEAK WITH CPT GRAHAM, BUT NOT TO TELL HIM ANYTHING. COL LATHROP ACCUSED ME OF BEING "STUPID OR UNABLE TO READ" THE COUNSELING STATEMENT, BECAUSE HE HAD NOT ORDERED ME TO REFRAIN FROM SPEAKING WITH LAWYERS, JUST NOT TO DISCUSS ANYTHING ABOUT THE LABORATORY WITH THEM. AT 3:45 P.M. THAT SAME AFTERNOON, I MET WITH CPT GRAHAM AT THE VISITING OFFICERS QUARTERS ("VOQ"), AS ORDERED. DEFENSE LAWYERS WERE NOT ALLOWED INTO THE LABORATORY, DESPITE THE FACT THAT PROSECUTION LAWYERS ENTERED AND ROAMED THROUGH THE LABORATORY FREELY.

26. FINALLY, ON MAY 15, 1984, I SENT A COPY OF MY COUNSELING STATEMENT TO MAJOR NICHOLAS AND LIEUTENANT COLONEL REED OF THE LEGAL OFFICE WITH A NOTE ASKING THEM ABOUT THE ASSURANCES THEY HAD GIVEN, WHEN THEY INTERVIEWED ME DURING THE WEEK OF MAY 7-11, THAT NO REPRISALS WOULD BE TAKEN AGAINST ME FOR SPEAKING WITH THEM.

27. ON MAY 21, 1984, I WAS AGAIN CALLED TO COL LATHROP'S OFFICE. CAPTAIN DANA LINDSAY, ASSISTANT BASE STAFF JUDGE ADJUTANT GENERAL ("JAG"), WAS PRESENT. AT THIS MEETING, COL LATHROP ORDERED ME TO WRITE THREE MEMORANDA FOR RECORD SUPPORTING HIS PUBLIC STATEMENTS, REPORTED IN THE AIR FORCE TIMES, THAT IN THE ENTIRE HISTORY OF THE AF DRUG TESTING PROGRAM, THERE WAS "NEVER A FALSE POSITIVE." HE ALSO ORDERED ME TO BRING HIM ANY EVIDENCE I HAD COMPILED TO SHOW THAT THERE WERE INDEED FALSE POSITIVES, SO THAT HE COULD "REVIEW IT AND TAKE APPROPRIATE ACTIONS REGARDING THE EVIDENCE." I ASKED TO SEE MY OFFICIAL PERSONNEL FILE, BUT COL LATHROP REFUSED MY REQUEST.

28. ON MAY 25, 1984, ACCORDING TO A STATEMENT MADE IN COURT BY CAPTAIN DEBRA SUCHENSKI, THE CIRCUIT PROSECUTOR, DR. BLOUSE STATED TO HER THAT, "WE'VE GOT TO DO SOMETHING ABOUT MR. WHITSON," (SEE TRANSCRIPT OF U.S. VS HODGES AND RICHARDS. CPT SUCHENSKI SUBSEQUENTLY ADMITTED TO ME THAT DR. BLOUSE'S PURPOSE IN GETTING RID OF ME WAS TO KEEP ME FROM TESTIFYING. LATER, ON THREE SEPARATE OCCASIONS, DR. BLOUSE DENIED IN COURT HAVING MADE THE STATEMENT. FINALLY, THE PROSECUTOR MADE AN OFFER OF PROOF AGAINST DR. BLOUSE TO THE EFFECT THAT DR BLOUSE HAD MADE THE STATEMENT, AND THE JUDGE ACCEPTED THAT OFFER OF PROOF.

29. ON MAY 29, 1984, THE COURT-MARTIAL TRIAL IN UNITED STATES V. HODGES AND RICHARDSON BEGAN. THE DEFENDANTS IN THE CASE WERE CHARGED WITH USING MARIJUANA ON THE BASIS OF URINALYSIS TESTS. I HAD BEEN SUBPOENAED TO TESTIFY FOR THE DEFENSE. PRIOR TO MY SCHEDULED APPEARANCE THAT DATE, DR. BLOUSE CALLED ME INTO HIS OFFICE, AND REPEATED COL LATHROP'S ORDER THAT I WRITE MEMORANDA FOR RECORD, WHICH I HAD NOT DONE BECAUSE, BASED ON THE DOCUMENTATION I HAD COMPILED IN THE "OUT OF CONTROL FILE," SUCH MEMORANDA WOULD BE FALSE AND MISLEADING. DR. BLOUSE INDICATED TO ME THAT COL LATHROP NEEDED THE MEMORANDA "WHEN HE TESTIFIES." HE

WARNED ME THAT, "IF YOU DON'T GET THEM DONE BY TOMORROW AT NOON, YOU'D BETTER DO SOMETHING TO PROTECT YOUR BUTT."

30. COMMENCING MAY 29, 1984, I TESTIFIED AT THE HODGES AND RICHARDSON TRIAL. IN RESPONSE TO QUESTIONS DURING MY TESTIMONY, I STATED THAT THERE WAS A POSSIBILITY OF FALSE POSITIVES IN THE LABORATORY'S DRUG TESTS. DURING BREAKS IN THE PROCEEDINGS, I ATTEMPTED TO SEE DR. BLOUSE, BUT WAS CONSISTENTLY TURNED AWAY BY CLAIMS THAT HE WAS "IN CONFERENCE," "OUT OF THE OFFICE," OR "TOO BUSY" TO SEE ME. I WAS UNABLE TO GET THROUGH TO HIM THAT ENTIRE WEEK, DURING WHICH I WAS ON THE WITNESS STAND EVERY DAY.

31. ON JUNE 2, 1984, I WAS ORDERED BY PRESIDING JUDGE SPILLMAN TO GO TO THE LABORATORY WHILE THE COURT WAS IN RECESS AND GATHER UP ANY AND ALL RECORDS I NEEDED TO SUPPORT MY TESTIMONY. MAJOR BROWN ACCOMPANIED ME TO THE LABORATORY. I ASSEMBLED THE RELEVANT RECORDS TO WHICH I HAD ACCESS. STAFF SERGEANT EVANS BRADLEY OF ADMINISTRATION WAS ON GUARD AT HIS DESK IN THE LABORATORY, AND I ASKED HIM THREE TIMES IF HE WOULD LIKE TO SEE WHAT WE WERE TRANSPORTING TO THE COURT. SSG BRADLEY REFUSED TO INSPECT THE RECORDS, WHEREUPON CPT BROWN AND I TOOK THE THEM TO THE COURTROOM.

32. DURING FURTHER TESTIMONY ON JUNE 2, 1984, JUDGE SPILLMAN ASKED ME IF THE RECORDS I TRANSPORTED FROM THE LABORATORY WERE ALL EXISTING RECORDS I NEEDED TO SUPPORT MY TESTIMONY. I RESPONDED THAT ADDITIONAL RECORDS I NEEDED WERE CONTAINED IN THE "OUT OF CONTROL FILE" STILL BEING MAINTAINED IN DR. BLOUSE'S OFFICE. CONSEQUENTLY, JUDGE SPILLMAN ORDERED DR. BLOUSE TO APPEAR PERSONALLY AND BRING ALL OF THOSE RECORDS WITH HIM. AFTER TESTIMONY WAS COMPLETED THAT DAY, ALL OF THE RECORDS WERE LOCKED IN A CLASSROOM IN BUILDING 180 TO WHICH THE PROSECUTION LAWYERS KEPT THE KEY.

33. ON SUNDAY, JUNE 3, 1984, THE RECORDS WERE TAKEN TO BUILDING 628 (THE BASE LEGAL OFFICE) AND COPIED BY A TEAM OF BOTH PROSECUTION AND DEFENSE LAYWERS. I WAS NEVER ALONE WITH THOSE RECORDS, AND AN AFFIDAVIT TO THAT EFFECT WAS DRAFTED AND SIGNED THAT DAY BY ALL PARTIES INVOLVED.

34. ON JUNE 4, 1984, DR. BLOUSE CONTINUED TO REFUSE TO SEE ME OR TO SIGN LAB RECERTIFICATION PAPERS I HAD DRAFTED. ACCORDING TO HIS SECRETARY, DR. BLOUSE DID LEAVE HIS OFFICE DURING THE DUTY DAY TO PICK UP DR. MAHMOUD ELSOHLY AT THE AIRPORT.

35. ON JUNE 5, 1984, I WAS AGAIN IN COURT MOST OF THE DAY. I HAVE BEEN TOLD THAT DR. ELSOHLY WAS PRESENT AT THE LABORATORY THAT DAY INSPECTING OTHER SECTIONS.

36. ON JUNE 6, 1984, DR. ELSOHLY CONTINUED HIS INSPECTION OF THE LABORATORY, THIS TIME COMING FOR ABOUT 2 HOURS TO THE QUALITY CONTROL SECTION. ON THIS DATE, DEFENSE LAWYERS INTERVIEWED COL

LATHROP IN THE MORNING HOURS, WHO TOLD THEM THAT THERE WERE NO PROBLEMS WITH MY JOB PERFORMANCE OR MY KNOWLEDGE OF THE "TECHNICAL ASPECTS" OF MY JOB. ON THIS DATE, I GAVE TESTIMONY AT THE PRETRIAL HEARING IN THE HODGES/RICHARDSON CASE.

37. ON JUNE 7, 1984, WHEN I RETURNED FROM LUNCH AT ABOUT 1:00 P.M., I WAS MET AT THE DOOR TO THE LABORATORY AND I WAS TOLD THAT I WAS NOT ALLOWED TO RETURN TO MY OFFICE. ACCORDING TO COL LATHROP, I HAD BEEN "RELIEVED AND DETAILED" FOR THE NEXT 120 DAYS FROM MY POSITION IN THE EPIDEMIOLOGY DIVISION, LABORATORY SCIENCES BRANCH, TO A GS-9 CHEMIST POSITION IN THE CLINICAL SCIENCES DIVISION, CLINICAL PATHOLOGY BRANCH, AND WAS TO CLEAR ALL OF MY PERSONAL BELONGINGS OUT OF MY OFFICE. I WAS GIVEN NO REASON FOR BEING RELIEVED AND DETAILED DESPITE MY REQUEST TO BE TOLD WHY THIS ACTION WAS BEING TAKEN AGAINST ME. MAJOR FREDDY C. DAVIS, CHIEF OF THE DATL, ESCORTED ME FROM DR. LATHROP'S OFFICE TO MY DESK. MAJOR DAVIS WATCHED ME CLEAN OUT MY DESK, AND THEN INSPECTED EVERYTHING I WAS TAKING WITH ME. MAJOR DAVIS THEN ESCORTED ME PAST OTHER LABORATORY PERSONNEL, SOME OF WHOM WERE POTENTIAL WITNESSES IN THE HODGES/RICHARDSON COURTS-MARTIAL. HE ALSO HAND-DELIVERED MY PERSONNEL FOLDER TO MY DETAIL SUPERVISOR, MISS WEASE. AT 3:30 P.M. THAT AFTERNOON, I CONTACTED THE COURT AND TOLD THEM I HAD BEEN "DETAILED" AND THE EVENTS OF THE AFTERNOON.

38. BETWEEN JUNE 8, 1984, AND JUNE 22, 1984, COLONEL ROYCE MOSER, JR., COMMANDER OF THE SCHOOL OF AEROSPACE MEDICINE SIGNED THE REQUEST FOR PERSONNEL ACTION INITIATED BY DR. BLOUSE IN ORDER TO ESTABLISH MY 120-DAY DETAIL AND DEMOTE ME FROM SUPERVISOR CHEMIST TO CHEMIST AT THE SAME GRADE AND PAY LEVELS. I WAS STRUCK BY CERTAIN IRREGULARITIES IN THE MANNER IN WHICH I WAS DETAILED AS DESCRIBED ABOVE. PURSUANT TO AF REGULATIONS, AF REG 334, PAPERWORK FOR A DETAIL IS SUPPOSED TO ORIGINATE FROM THE PERSON WHO NEEDS A JOB, NOT FROM THE PERSON WHO WANTS TO GET RID OF AN EMPLOYEE. IN MY CASE, MY OWN SUPERVISOR, DR. BLOUSE, SIGNED THE REQUEST FOR THE DETAIL. ALSO, I WAS DETAILED ON JUNE 7, 1984, BUT THE AUTHORIZING PAPER- WORK WAS NOT COMPLETED UNTIL JUNE 22, 1984.

39. ON JUNE 8, 1984, DR. LATHROP ORDERED ME TO COME TO THE LABORATORY TO RECEIVE SOME LETTERS. I WAS ALSO TOLD I WAS STILL UNDER HIS COMMAND UNTIL FURTHER NOTICE. HE DID NOT WANT ANY WITNESSES PRESENT, BUT I REFUSED TO GO INTO HIS OFFICE ALONE DUE TO HIS EARLIER TIRADES. HE GAVE ME A LETTER STATING I WAS TO BE GIVEN REASONABLE TIME FOR COURT APPEARANCES, AND A LETTER STATING I WAS, BY THE END OF THE DAY, TO REVIEW AND INVENTORY ALL INFORMATION GIVEN TO THE PROSECUTION AND/OR DEFENSE IN THE HODGES/RICHARDSON MATTER AND PROVIDE HIM WITH A DETAILED LISTING OF THE INFORMATION.

40. ON JUNE 8, 1984, DR. ELSOHLY TESTIFIED AT THE HODGES/RICHARDSON TRIAL. HE STATED IN HIS TESTIMONY THAT THE LABORATORY'S "QUALITY CONTROL IS GOOD, BUT NOT WHAT I WANTED TO SEE." HE ADMITTED THAT HE HAD SIGNED THE EINSEL COMMISSION

REPORT, WHICH HAD FOUND NO QC DEFICIENCIES. DURING THE COURSE OF HIS TESTIMONY, HE INDICATED THAT HE HAD BEEN CALLED ON MAY 29, 1984, BY DR. BLOUSE, WHO INSISTED THAT HE COME TO BROOKS AFB AS SOON AS POSSIBLE. HE FURTHER TESTIFIED THAT DR. LATHROP HAD INSISTED THAT DR. ELSOHLY "PUT SOMETHING IN WRITING ABOUT MR. WHITSON." ALSO, DR. LATHROP HAD INSISTED THAT DR. ELSOHLY BRIEF MAJOR GENERAL ORD, THEN COMMANDER OF AEROSPACE MEDICAL DIVISION, AND COLONEL MOSER, THE SCHOOL COMMANDER, ABOUT HIS INSPECTION.

41. ON JUNE 8, 1984, ONE DAY AFTER I HAD BEEN ESCORTED OUT OF MY OFFICE, DR. ELSOHLY WROTE THE LETTER THAT WAS USED AS THE BASIS OF MY 120-DAY "DETAIL." ALSO ON THIS DATE, MAJOR GENERAL ORD ORDERED AN "INVESTIGATION INTO THE CONDUCT AND EFFICIENCY OF THE QUALITY CONTROL SECTION." THE INVESTIGATION WAS CONDUCTED AND A REPORT ISSUED BY COLONEL DESJARDENS AND MAJOR MCCLELLAN ("DESJARDENS REPORT"). THE REPORT ATTRIBUTED THE QUALITY CONTROL PROBLEMS INDENTIFIED DURING THE INVESTIGATION AS BEING THE RESULT OF SEVERAL FACTORS, AND STATES THAT, I WAS A GS-9 CHEMIST DOING A GS-13-LEVEL JOB. THE DEFICIENCIES WERE NOT CAUSED BY ME, AND THAT I ACTUALLY MADE SOME PROGRESS IN FIXING MANY OF THE PROBLEMS IN THE LAB. THE REPORT BLAMES THE DEFICIENCIES ON A VARIETY OF FACTORS, MOST OF WHICH PREDATED MY ASSIGNMENT THERE. THE REPORT CONCLUDES THAT "IF SENSITIVITY IS LOWERED...NO QUALITY CONTROL PROGRAM, NO MATTER HOW GOOD, CAN PREVENT AN UNACCEPTABLE LEVEL OF FALSE POSITIVES." SENSITIVITY WAS LOWERED LESS THAN SIX MONTHS LATER.

42. THE PRETRIAL HEARING IN THE HODGES/RICHARDSON CASE ENDED ON JUNE 13, 1984, WHEN THE JUDGE DISMISSED THE CHARGES BASED ON HIS RULING THAT THE DEFENDENTS COULD NOT RECEIVE A FAIR TRIAL DUE TO THE LACK OF CREDIBILITY OF THE AIR FORCE WITNESSES AND THE MISSING DOCUMENTS. THE JUDGE SPECIFICALLY UPHELD THE CREDIBILITY OF MY TESTIMONY AND THAT OF OTHER WITNESSES THAT APPEARED FROM THE LABORATORY AND TESTIFIED FOR THE DEFENSE.

43. IN JULY 1984, WHILE ON DETAIL, I WAS GIVEN PERFORMANCE RATINGS FOR JUNE SIGNED BY MS. WEASE, MY DETAIL SUPERVISOR. BASED ON A REVIEW OF 21 DAYS, MS. WEASE RATED ME AT 7.0 ON A SCALE OF 1-9. MY DETAIL INVOLVED LITTLE OR NO DUTIES, AND I WAS RELEGATED TO AN OFFICE SPACE IN THE BASEMENT.

44. ON AUGUST 17, 1984, I FILED A COMPLAINT WITH THE OFFICE OF THE SPECIAL COUNSEL (OSC), STATING THAT RETALIATORY PERSONNEL ACTION HAD BEEN TAKEN AGAINST ME FOR ENGAGING IN THE PROTECTED ACTIVITY IF TESTIFYING AT A MILITARY TRIBUNAL. I REQUESTED REINSTATEMENT TO MY FORMER POSITION, AND PROVIDED THE OSC AN OUTLINE OF THE EVENTS THAT LED TO MY DEMOTION, AS WELL AS DOCUMENTATION OF MY PERFORMANCE JUST PRIOR TO TESTIFYING. I PROVIDED THE OSC A WITNESS LIST IN ORDER TO FACILITATE THEIR INVESTIGATION OF MY COMPLAINT.

45. ON AUGUST 24, 1984, MY JOB PERFORMANCE WAS AGAIN RATED,

THIS TIME BY DR. BLOUSE AND COL LATHROP, ONE WEEK BEFORE COL LATHROP RETIRED. THEY RATED ME 4.4 ON A MAXIMUM SCALE OF 9.0. I FILED A GRIEVANCE BASED ON THIS RATING, AND DR. BLOUSE LATER ADMITTED THAT MY RATINGS WERE LOWERED BECAUSE I TESTIFIED IN COURT AND BECAUSE OF DR. ELSOHLY'S QUALITY CONTROL "INSPECTION REPORT."

46. ON AUGUST 27, 1984, I RECEIVED A REPLY FROM THE OSC SIGNED BY ELLEN OSKUE AND RALPH EDDIE, CHIEF OF COMPLAINTS, IN WHICH THEY ACKNOWLEDGED RECEIPT OF MY COMPLAINT. ON SEPTEMBER 17, 1984, I SENT MR. EDDIE 120 PAGES OF EXHIBITS, ALONG WITH A DETAILED LETTER EXPLAINING EVERYTHING THAT HAD HAPPENED SINCE I FILED MY ORIGINAL COMPLAINT.

47. IN SEPTEMBER 1984, I RECEIVED SUPERVISORY RATINGS FROM DR. BLOUSE, WHO AGAIN LOWERED MY PERFORMANCE RATING TO 2.2 ON A MAXIMUM 5.0 SCALE. WHEN I FILED A GRIEVANCE BASED ON THIS RATING, DR. BLOUSE ADMITTED BY LETTER IN ANSWER TO MY GRIEVANCE THAT THERE WERE NO JOB PERFORMANCE ELEMENTS AVAILABLE IN MY PERSONNEL FILE, WHICH WAS KEPT IN THE CIVILIAN PERSONNEL OFFICE, BECAUSE OF "MANAGEMENT OVERSIGHT"; DR. BLOUSE INDICATED THAT HE AND DR. LATHROP "MADE SOME (PERFORMANCE STANDARDS) UP IN RETROSPECT." THEN THEY DECIDED I COULD NOT POSSIBLY HAVE FULFILLED THEM, SINCE I HAD NOT KNOWN ABOUT THEM.

48. ALSO ON SEPTEMBER 14, 1984, MAJOR GENERAL ORD, COMMANDER OF THE AEROSPACE MEDICAL DIVISION, HELD A PRESS CONFERENCE AT WHICH HE STATED THAT, ACCORDING TO SEVERAL AIR FORCE INTERNAL INVESTIGATION REPORTS, THE DRUG ABUSE TESTING LABORATORY HAD NO PROBLEMS AND THE AIR FORCE WAS MAKING A GOOD LABORATORY EVEN BETTER. ONE WEEK LATER (IN SEPTEMBER), MAJ GEN ORD WAS REASSIGNED TO THE STRATEGIC AIR COMMAND (SAC).

49. IN OCTOBER 1984, COL ROYCE MOSER, JR., COMMANDER OF THE USAF SCHOOL OF AEROSPACE MEDICINE, AT DR. BLOUSE'S REQUEST SIGNED THE PAPERWORK EXTENDING MY "DETAIL" ANOTHER 120 DAYS. IN RESPONSE TO A GRIEVANCE I FILED CONCERNING THIS EXTENSION OF THE DETAIL, DR. MOSER REPLIED IN WRITING THAT "THE REPORTS (OF THE INVESTIGATIONS) AREN'T IN YET," SO MY DETAIL WAS STILL IN EFFECT. [REMEMBER, A 2-STAR GENERAL HAD ANNOUNCED THAT "ALL REPORTS ARE IN" LESS THAN 3 WEEKS EARLIER.] DURING OCTOBER 1984, THE THREE GRIEVANCES I HAD FILED WERE FORWARDED TO THE AIR FORCE CIVILIAN APPELLATE REVIEW AGENCY (AFCARA) BY THE BASE COMMANDER, WHO STATED THAT, BECAUSE THE INFORMATION I HAD PROVIDED IN THE GRIEVANCE WAS IN CONFLICT WITH THE OFFICIAL POSITION, HE COULD NOT RESOLVE THE GRIEVANCES.

50. IN OCTOBER 1984, I CONTACTED THE OSC BECAUSE I HAD RECEIVED NO REPLY TO THE MATERIALS I HAD SENT IN SEPTEMBER. I WAS INFORMED THAT MR. EDDIE WAS NO LONGER HANDLING MY CASE, WHICH HAD BEEN REASSIGNED TO JEFFREY COVERT. I TRIED TO REACH MR. COVERT BY TELEPHONE SEVERAL TIMES, BUT WAS UNABLE TO, AND MY CALLS WERE NEVER RETURNED BY HIM.

51. ON OCTOBER 18, 1984, I WAS CONTACTED BY TELEPHONE BY CPT HUNTER, AN ARMY PROSECUTOR AT FORT SAM HOUSTON IN SAN ANTONIO, TEXAS, WHO REQUESTED THAT I TESTIFY IN A PENDING TRIAL. THE FOLLOWING DAY, I RECEIVED AN ANONYMOUS TELEPHONE CALL IN WHICH THE CALLER THREATENED THAT, "IF YOU TESTIFY, IT WILL COST YOU YOUR JOB." I WAS GIVEN WRITTEN ORDERS TO GO TESTIFY, SO I OBEYED THOSE ORDERS AND WENT.

52. IN DECEMBER 1984, I WAS SUBPOENAED BY THE DEFENSE TO TESTIFY IN A COURT-MARTIAL TRIAL AT SCOTT AIR FORCE BASE IN ILLINOIS. I WAS GIVEN TDY ORDERS TO APPEAR FOR A 39-1 ADMINISTRATIVE HEARING. THIS TRIAL INVOLVED CHARGES OF DRUG USE BASED ON A POSITIVE URINALYSIS FOR THC OR MARIJUANA. MY APPEARANCE AS A WITNESS REQUIRED ME TO BE IN ILLINOIS FOR THREE DAYS.

53. ON DECEMBER 13, 1984, THE DAY I RETURNED FROM TESTIFYING IN ILLINOIS, I WAS SUMMONED TO THE OFFICE OF DR. JULIO E. ACEVEDO, CHIEF OF THE CLINICAL PATHOLOGY BRANCH WHERE I HAD BEEN DETAILED. THIS IS THE SAME INDIVIDUAL THAT HAD BEEN AT THE MEETING WHEN DR. BLOUSE HAD ORDERED THE CLEANUP OF THE CAP INSPECTION REPORT. HE TOLD ME THAT I WOULD BE "PERMANENTLY, INVOLUNTARILY REASSIGNED." WHEN I ASKED DR. ACEVEDO WHO HAD MADE THE DECISION TO REASSIGN ME, HE SAID HE DID NOT KNOW, HOWEVER, IT WAS BY ORDER OF THE SCHOOL COMMANDER, COL MOSER. I REQUESTED THE OSC ISSUE A STAY. THIS REQUEST WAS SENT BY REGISTERED MAIL. I RECEIVED A REPLY THAT THEY REFUSED TO SEEK A STAY.

54. IN EARLY JANUARY 1985, I CONTACTED THE OSC AND INQUIRED ABOUT THE STATUS OF MY COMPLAINT TO THAT OFFICE. I WAS TOLD TO CALL THE OSC BRANCH IN DALLAS, TEXAS, WHICH WOULD BE HANDLING MY CASE. I IMMEDIATELY CALLED THE DALLAS OFFICE, AND LEARNED THAT RODNEY WILLIAMS WAS ASSIGNED TO MY CASE. I ASKED WHAT HE HAD BEEN SENT FROM WASHINGTON, AND HIS REPLY WAS "NOTHING." I THEN SENT COPIES OF ALL OF MY DOCUMENTS TO HIM. MR. WILLIAMS SCHEDULED A MEETING WITH ME FOR THE SECOND WEEK OF JANUARY, BUT DID NOT SHOW UP FOR THE APPOINTMENT. WHEN I CALLED TO FIND OUT WHY HE HAD NOT SHOWN UP FOR OUR MEETING, MR. WILLIAMS TOLD ME HE HAD FORGOTTEN TO CALL ME TO RESCHEDULE THE MEETING FOR THE END OF THE MONTH.

55. ON JANUARY 19, 1985, MY DETAIL WAS TERMINATED. ON JANUARY 20, 1985, THE GS-9 SUPERVISORY CHEMIST POSITION I ORIGINALLY HELD WAS CANCELLED, AND I WAS ASSIGNED TO A GS-9 CHEMIST POSITION AT THE AEROSPACE MEDICAL DIVISION, (AF SYSTEMS COMMAND), USAF SCHOOL OF AEROSPACE MEDICINE, CLINICAL SCIENCES DIVISION, CLINICAL PATHOLOGY BRANCH, AT BROOKS AFB. THE SUPERVISORY CHEMIST POSITION THAT WAS CANCELLED WAS RECREATED AS A GM-14 BY THE CIVILIAN PERSONNEL OFFICE. EVEN THOUGH I HAD FILLED THAT POSITION, AND DONE A CREDIBLE JOB ACCORDING TO THE DESJARDINS REPORT, CIVILIAN PERSONNEL REFUSED TO ACCEPT MY APPLICATION FOR MY FORMER JOB, "BECAUSE YOU'RE ONLY A 9."

56. ON JANUARY 22, 1985, I RECEIVED WRITTEN NOTICE OF THE ABOVE REASSIGNMENT, EFFECTIVE TWO DAYS EARLIER, JANUARY 20, 1985, FROM THE SCHOOL COMMANDER, COL MOSER. I FILED A GRIEVANCE STATING THAT I WAS HIRED IN THE DRUG ABUSE FUNCTION AND, BASED ON MAJ GEN ORD'S SEPTEMBER 1984 STATEMENTS THAT DRUG ABUSE WAS NOW A SEPARATE COMMAND REPORTING TO HIM. COL MOSER AS SCHOOL COMMANDER DID NOT HAVE THE AUTHORITY TO ORDER MY REASSIGNMENT. THIS GRIEVANCE WAS ALSO FORWARDED TO THE AFCARA.

57. IN LATE JANUARY 1985, I APPEARED FOR THE RESCHEDULE MEETING WITH MR. WILLIAMS OF OSC/DALLAS, BUT AGAIN HE FAILED TO SHOW UP AND NEVER CALLED ME. IN EARLY FEBRUARY 1985, I CALLED THE OSC/DALLAS OFFICE TO FIND OUT WHY MR. WILLIAMS HAD NOT MET ME AS AGREED. MR. WILLIAMS TOLD ME THAY MY CASE HAD BEEN REASSIGNED TO THE OSC HEADQUARTERS IN WASHINGTON, D.C. BECAUSE OF ITS POLITICAL SENSITIVITY, AND THAT I SHOULD CALL THE OSC'S 800 NUMBER SINCE HE WAS UNWILLING TO DISCUSS THE STATUS OF THE INVESTIGATION OF MY COMPLAINT.

58. OVER THE NEXT FEW MONTHS, I CONTINUED MY EFFORTS TO FIND OUT WHAT ACTION OSC/WASHINGTON WAS TAKING ON MY COMPLAINT, WHICH HAD BEEN ASSIGNED TO STAN VERUSIO. MR. VERUSIO WAS THE FIRST AND ONLY PERSON IN THE OSC WHO TRIED TO BE HELPFUL ON THE CASE. HE REQUESTED THAT I PROVIDE THE OSC WITH ADDITIONAL SPECIFIC INFORMATION, IN RESPONSE TO WHICH I SENT THE OSC ANOTHER 22 POUNDS OF DOCUMENTS, BY EXPRESS MAIL AT MY OWN EXPENSE. MR. VERUSIO ALSO SAID HE WOULD COME TO TEXAS TO INTERVIEW ME AND MY WITNESSES, AND DID SUBSEQUENTLY CONTACT THREE OF THE DEFENSE ATTORNEYS IN THE HODGES/RICHARDSON CASE TO SET UP INTERVIEWS BY PHONE.

59. IN MARCH 1985, THE OSC REASSIGNED MY CASE TO PATRICIA STONE. FOR ABOUT ONE MONTH, I REPEATEDLY MADE TELEPHONE CALLS TO MS. STONE, BUT WAS UNSUCCESSFUL IN REACHING HER AND SHE NEVER RETURNED MY CALLS. IN EARLY APRIL 1985, I FINALLY GOT THROUGH TO MS. STONE, WHO SCHEDULED INTERVIEWS WITH ME AND MY WITNESSES FOR APRIL 10. SHE DID NOT SHOW UP, AND INSTEAD, ON APRIL 11 CALLED ME TO CANCEL THE INTERVIEW. MS. STONE SCHEDULED TWO SUBSEQUENT APPOINTMENTS, BOTH OF WHICH SHE CANCELLED WITHOUT NOTICE. EACH TIME, I HAD PREPARED AND ROUNDED UP MY WITNESSES, ONLY TO BE FORCED TO TELL THEM THAT MS. STONE HAD STOOD US UP WITHOUT THE COURTESY OF ADVANCE NOTICE.

60. ON JULY 1, 1985, MY SUPERVISOR IN THE CLINICAL SCIENCES DIVISION, DR. SCHWERTNER, GAVE ME A JOB PERFORMANCE RATING OF 8.6 ON A SCALE OF 1 TO 9 ("SUPERIOR").

61. ON JULY 8, 1985, THE MERIT SYSTEMS PROTECTION BOARD ISSUED A LETTER TO ME INDICATING THAT IT HAD NO JURISDICTION OVER MY CASE BECAUSE IT INVOLVED THE MILITARY.

62. IN AUGUST 1985, I MADE A TRIP TO WASHINGTON, D.C. TO SEE SOMEONE--ANYONE--FROM OSC FACE TO FACE. I MADE PRIOR ARRANGEMENTS

FOR AN APPOINTMENT WITH MS. STONE ON AUGUST 21 AT 2:00 P.M. I ARRIVED EARLY FOR THE APPOINTMENT, AND WAITED UNTIL 3:30 P.M., WHEN I WAS FINALLY TOLD THAT SHE WOULD NOT BE IN AT ALL THAT DAY. UNDER THE CIRCUMSTANCES, I INSISTED ON SPEAKING WITH HER BOSS, AND WAS ALLOWED IN TO SEE MR. VINCENT RUSSELL. WHILE I WAS MEETING WITH MR. RUSSELL, MS. STONE SHOWED UP AND HER COMMENTS REVEALED THAT SHE KNEW LITTLE, IF ANYTHING, ABOUT MY CASE. SHE HAD ALLEGEDLY BEEN ASSIGNED THE CASE FOR 6 MONTHS, SINCE MARCH. SHE DID NOT KNOW WHERE THE OSC FILE OR DOCUMENTATION ON MY CASE WERE, BUT INSISTED SHE NEEDED MORE INFORMATION. SHE WAS NOT SURE WHAT FURTHER INFORMATION SHE NEEDED, AND REFUSED TO TRY TO LOCATE MY FILE SO THAT THIS COULD BE DETERMINED.

63. ON SEPTEMBER 10, 1985, I SENT ADDITIONAL INFORMATION TO OSC/WASHINGTON, WHICH INCLUDED LATER JOB PERFORMANCE RECORDS FROM MY PERSONNEL FILE. ON SEPTEMBER 12, 1985, I RECEIVED A LETTER SIGNED BY WILLIAM E. REUKAUF, THE OSC'S ASSOCIATE SPECIAL COUNSEL FOR PROSECUTION, STATING THAT THERE WERE "INSUFFICIENT GROUNDS TO TAKE FURTHER ACTION" AND THAT "THE SPECIAL COUNSEL LACKS JURISDICTION OVER MILITARY PERSONNEL" FOR PROHIBITED PERSONNEL PRACTICES. TO MY KNOWLEDGE, THE OSC HAD NEVER INTERVIEWED MY WITNESSES BEFORE REACHING THIS DECISION. UPON RECEIVING MR. REUKAUF'S LETTER, I CALLED OSC/WASHINGTON. IT TOOK ME TWO DAYS TO GET THROUGH TO MS. STONE. WHEN I ASKED HER WHY THE CASE HAD BEEN DISMISSED, AND WHY I HAD BEEN ASKED TO SUBMIT ADDITIONAL INFORMATION, SHE REPLIED THT SHE WAS NOT AT LIBERTY TO DISCUSS THE CASE AND THAT "LEGAL" HAD MADE THE DECISION. SHE REFERRED ME TO MR. FONG OF THE OSC'S LEGAL OFFICE, WHO HAD MADE THE DECISION TO DROP THE INVESTIGATION. IN A BRIEF CONVERSATION WITH MR. FONG, HE TOLD ME THAT "AS FAR AS I'M CONCERNED, YOUR CASE IS DROPPED," AND WOULD NOT DISCUSS ANYTHING FURTHER WITH ME.

64. IN DECEMBER 1985, I RECEIVED A LETTER FROM AFCARA STATING THAT THE GRIEVANCE EXAMINER WAS GOING TO DISMISS TWO OF MY GRIEVANCES BASED ON THE RESPECTIVE FINDINGS OF NO JURISDICTION BY THE MERIT SYSTEMS PROTECTION BOARD (MSPB) AND THE OFFICE OF SPECIAL COUNSEL. I APPEALED THE AFCARA DISMISSAL, AND THE GRIEVANCES WERE REINSTATED BY AIR FORCE HEADQUARTERS. NEITHER THE OSC NOR THE MSPB HAD ADDRESSED THE ISSUES I HAD RAISED IN THE AGENCY GRIEVANCES.

65. WHEN THE GRIEVANCES WERE REINSTATED IN DECEMBER 1985, MY ATTORNEY AND I ANNOUNCED THAT WE WERE READY TO PROCEED. THE AGENCY, HOWEVER, WAS NOT READY, AND REQUESTED A CONTINUANCE TO JANUARY 1986, WHICH IT GRANTED ITSELF.

66. ON JANUARY 13, 1986, I RECEIVED NOTICE THAT MY JOB WAS TO BE AUDITED AND ABOLISHED. THIS ACTION WAS BASED ON AIR FORCE REGULATIONS WHICH PROHIBIT CONTINUATION OF AN "OVERAGE" POSITION -- THAT IS, A POSITION CREATED FOR WHICH THERE ARE NO FUNDS SPECIFICALLY AUTHORIZED -- FOR MORE THAN ONE CALENDAR YEAR. WHEN I WAS VOLUNTARILY AND PERMANENTLY REASSIGNED FROM THE DRUG ABUSE

FUNCTION, MY CHEMIST JOB IN THE LIPIDS EVALUATION FUNCTION WAS AN OVERAGE POSITION. JANUARY 20 WAS THE ONE-YEAR ANNIVERSARY DATE OF MY REASSIGNMENT TO THE OVERAGE POSITION IN LIPIDS EVALUATION.

67. SHORTLY AFTER RECEIVING NOTICE THAT MY CIVILIAN AIR FORCE POSITION WAS TO BE ABOLISHED AS OF JANUARY 20, 1986, I SECURED A JOB OFFER FROM THE ARMY.

68. AT THE END OF JANUARY 1986, A HEARING TOOK PLACE ON MY GRIEVANCES BEFORE THE AFCARA. THE GRIEVANCE EXAMINER "CONTINUED THE CASE." THE GROUNDS FOR CONTINUING THE CASE INCLUDED THE EXAMINER'S STATEMENT THAT HE WOULD NOT TAKE TESTIMONY BECAUSE MAJOR GENERAL (THEN BRIGADIER) FREDERICK DOPPELT, WHO HAD REPLACED MAJ GEN ORD AS COMMANDER OF THE AEROSPACE MEDICAL DIVISION AT BROOKS AFB, DID NOT WANT TESTIMONY TO BE TAKEN. THE EXAMINER SAID HE WOULD DECIDE THE CASE BASED ON THE RECORD HE ALREADY HAD (DATING FROM JANUARY 1985). HE ALSO STATED THAT, SINCE THE RECORD REFLECTED MY IMPENDING TRANSFER TO THE ARMY CIVILIAN FORCE, HE PLANNED TO CONTINUE THE CASE UNTIL HE RECEIVED A STANDARD FORM 50 FROM THE AIR FORCE STATING THAT I HAD BEEN PICKED UP BY THE ARMY AND THEN WOULD RULE THAT HE, LIKE THE MSPB AND OSC, HAD NO JURISDICTION SINCE I "WOULD HAVE LEFT THE AGENCY."

69. ON JANUARY 25, 1986, I WAS LATERALLY TRANSFERRED TO MY CURRENT POSITION AS STATISTICIAN (HEALTH) WITH THE U.S. ARMY.

70. BY LETTER DATED FEBRUARY 28, 1986, THE AFCARA ISSUED THE DECISION IN MY CASE WHICH CANCELLED MY GRIEVANCE BASED ON AIR FORCE REGULATION 40-771. ACCORDING TO THE DECISION, THAT REGULATION "STATES THAT GRIEVANCE WILL BE CANCELLED BY THE OFFICIAL CONSIDERING IT ON THE EMPLOYEES SEPARATION FROM AIR FORCE EMPLOYMENT FOR REASONS NOT CONNECTED WITH THE GRIEVANCE, PROVIDED THERE IS NOT QUESTION OF PAY INVOLVED OR OTHER PERSONAL RELIEF THAT COULD BE GRANTED TO THE EMPLOYEE." THE DECISION CONCLUDES THAT MY "GRIEVANCES MEET THESE CRITERIA."

71. THE OSC IS QUITE GOOD AT EVISCERATING WHISTLEBLOWERS. ALL I WANTED WAS A FAIR HEARING OF MY COMPLAINT. NOW, ALMOST THREE YEARS LATER, I HAVE EXHAUSTED MY "ADMINISTRATIVE REMEDIES". I HOPE TO HAVE THAT "AIRING OF THE LAUNDRY" SOON. SADLY, IT NEED NOT HAVE COME TO THIS, HAD SOMEONE JUST LISTENED AND HELPED.

Statement of Mary E. Brothers, M.D.
Former Staff Surgeon, Leavenworth VA Center

Introduction:

Mary Brothers, M.D. is a 1974 graduate of the University of Kansas College of Medicine who externed at the Leavenworth VA Medical Center in general surgery and orthopedics from January to June of 1975, followed by completion of a four year residency program in general surgery at the same Center on June 28, 1979. This residency program was known as a free-standing (non-university affiliated) program and was phased out in June, 1981, along with all others of its type in the USA. The Chief of Surgery at that time was Dr. Mary P. McAnaw, who was appointed in 1973.

Following completion of her residency Brothers entered private practice in general surgery and industrial medicine with her father in Kansas City, Missouri. During Brothers' first year in practice she began to learn the fundamentals of industrial medicine and also occasionally assisted another Kansas City area surgeon in his surgical procedures. In 1980 Brothers accepted an appointment as the Health Services Director for Midwest Grain Co., Inc, (formerly Midwest Solvents) of Atchison, Kansas. In May of 1980 Brothers learned from one of her former nurse associates at Leavenworth VA that the surgical program there was short of staff and looking for help, especially in taking night call. Brothers then approached Surgery Service Chief McAnaw and offered to return to the VA, part-time, to assist. Her application was accepted and she was granted Consultant status. Shortly thereafter her status was advanced by the VA to temporary, part-time, staff surgeon, on two-eights salary, effective in June of 1980 for three months. Three three-month extensions were later granted. At that time, then, Brothers had three part-time positions in Kansas City, Leavenworth, and Atchison. Her duties at the VA included taking night call, assisting in surgical rounds and teaching the surgical resident staff. Because of the upcoming demise of the free-standing residency program (slated for June, 1981) the surgical staff consisted of one chief resident, four first year residents, the Chief of Surgery, a second full-time staff surgeon, and Brothers.

The Anafranil Study:

In 1979 a Phase III drug research study, entitled, "Anafranil, Efficacy and Tolerability Study in Severe Psychotic Depression, Protocol 47" was approved via the Research and Development Committee (R and D) and initiated by the former Chief of Psychiatry at the Leavenworth VA in December of that year. The study called for enrollment of twenty individuals for testing with the research drug and a control. This study was being sponsered by Ciba-Geigy Company at several centers across the USA.

Unknown to Brothers, earlier in 1980 a Ph.D. staff psychologist at Leavenworth VA was approached by one of his outpatients who had been enrolled into the Anafranil study, and who had questions about his involvement as a research subject. The psychologist knew nothing about the study so he obtained the protocol for review and also reviewed the patient's hospital chart. He was surprised, and alarmed, to find that the patient in question did not have the correct diagnosis required for inclusion into the research study. The psychologist decided this should be investigated so he consulted McAnaw about his observations. He did this as it was his impression that the Leavenworth VA's Chief of Staff did not have a high opinion of the role of Ph.D.'s in working with physicians.

Dr. McAnaw at first could not believe such a discrepancy had occurred but, after reviewing some study records, she also became concerned about the conduct of the Anafranil study.

On February 25, 1980 McAnaw and the psychologist had a conference with the Chief of Staff about their questions regarding the Anafranil study. He told them he would look into it further. The very next day after this meeting he placed a telephone call to the former Chief of Psychology, a career psychologist with forty-three years of Federal service, and told him to keep his staff psychologist out of areas in which he "did not belong". The Chief of Psychology had no idea what was going on, spoke with his staff member, and then learned of the questions regarding the Anafranil study.

Throughout the Spring and Summer of 1980 no apparant action was taken with respect to the allegations about the Anafranil study. Minutes of the Center Research and Development Committee reviewed by McAnaw, a Committee member, either contained non-comittal remarks, or statements that the study was proceeding according to plans, or above expectations. An FDA inspector also apparantly found no discrepancies in a site visit. The Chief of Staff eventually asked two other R and D Committee members to review the study in June, 1980, and their September, 1980, report found no problems.

Other Problems:

Concurrent with the Anafranil questions, McAnaw was experiencing increasing difficulties in obtaining assistance in expediting solutions to problems in the Surgical Service. These issues included:

1. implementation of computerized stocking of supplies (via SPD Service) for the operating suite,
2. surgical staffing of nurses (chronic shortage),
3. construction projects for new fire doors as mandated by Joint Commission on Accreditation of Hospitals (JCAH) recommendations in the surgery and recovery room areas... construction was begun precipitously and without care to control dust, noise, etc.,
4. a marked increase in bats in the operating suite areas, over the usual problems...seventeen were captured in July, 1980, alone,
5. construction of new recovery room area (fire doors and power packs) per JCAH, without due regard for space requirements to care for operated patients.

With respect to the issue of bats, Brothers had personally witnessed bats in the surgical suite, and McAnaw had been unable to obtain a satisfactory response from the Administration about what could be done about the problem. On one occasion McAnaw took a captured bat to the office of the Assistant to the Center Director, and was told by him to, "Call the Chaplain...have him exorcise them". In July of 1980 McAnaw wrote a memo to the former Center Director about the bats.

Dr. Brothers' Involvement:

In mid-July of 1980 McAnaw was abruptly summoned to a meeting with the Chief of Staff and Center Director, during which it was suggested that she look for a job outside the Leavenworth VA. This was apparently triggered by the memo on the problem with the bats. When Brothers (at this time still completely unaware of the Anafranil problem) heard of this proposed removal of a highly competent and much-admired staff surgeon she could not understand the motivation behind it, and decided to become involved. After searching for a way to offer some assistance Brothers read an article on the I.G.'s "Hotline" in the July, 1980, issue of VA Vanguard (Appendix A). Brothers wrote a letter to the VA's I.G. on August 1, 1980 (Appendix B), and mailed it without telling McAnaw about it until after the fact. Brothers then left for a scheduled two week vacation.

On returning from vacation Brothers received a reply from the I.G. which assigned her inquiry I.G. Control No. 1066. She was told she could contact the I.G. to find out what action had been taken. At about this time McAnaw asked for a meeting with Brothers; in this meeting she told Brothers, for the first time, of the questions regarding the Anafranil study, and asked Brothers' opinion. By this time McAnaw had researched all the available R and D Minutes, and other materials, on the study. McAnaw and the staff psychologist had concluded that the Leavenworth VA Center Administration was proceeding with a coverup of the study and the questions which had been raised. They speculated that one reason for this could be that the Chief of Staff's wife, also a physician, was an employee in the Department of Psychiatry, working with the study investigator. (It later came to light that she was an unnamed co-investigator in the Anafranil study). Brothers reviewed all of McAnaw's notes and concluded that there were serious questions which needed to be examined further regarding the Anafranil study. Brothers also concluded that McAnaw's inquiries were almost certainly the real reason for the proposed removal to another job. She determined at this time to continue to seek an investigation into the questions about the drug study as well as the proposed removal of McAnaw.

In the Fall of 1980 McAnaw found she was expecting her sixth child and would be planning for a maternity leave in late March of 1981. She began to seek to hire a third full-time staff surgeon to replace a staff member who had gone to visit relatives in Iran, and was unable to return (during the hostage crisis). McAnaw and the only remaining staff surgeon, who had joined the Surgical Service in July, 1980, began to go through old application files, and at least one applicant toured the Surgical Service. It was learned that VA Central Office would send a site visitor to Leavenworth in late November. Of most importance, the Center Director called McAnaw and asked her why she had sent a letter to Washington on her own behalf. When McAnaw said she had not done this, and asked for a copy, the Director sent her Brothers' August 1st letter to the I.G. office! Although the identifying paragraph and signature had been removed, the I.G. had left three sentences in the letter which would identify the probable author (Appendix C).

Brothers finally examined two Anafranil patient records on October 31, 1980. Her increasing concern prompted a second letter to the I.G., following a followup call to the "Hotline", which detailed her concerns about the Anafranil study (Appendix D). Brothers requested that the matter be directed to the attention of the site investigator. This letter was dated October 28, 1980; no formal reply was ever received. Meanwhile, McAnaw was in contact with VA Central Office Surgical Service, and was told she could have "documentation" ready for the site visit if she had concerns. However, despite the fact that the Director had earlier asked for "...specific...concerns...just vague innuendoes will not be helpful", from McAnaw, she later refused McAnaw's request to examine additional patient records from the study. The Chief of Staff arranged for a psychopharmacologist from the University of Kansas to look over the study. This "site survey" was quite limited in time, was paid for with funds from the study, and the final report pronounced the Anafranil a "state of the art" study.

Brothers' Hiring:

On December 31, 1980, Brothers' regular workday at Leavenworth, McAnaw asked to meet with her, and offered her the full-time staff surgeon's job. Of the other acceptable candidates one had found the salary too low to support his family, and several were not available before July 1, 1981, as they were only just completing their training programs. McAnaw believed strongly that the third staff member needed to be "on board" before her maternity leave to help carry the work load and complete the teaching of the last group of residents in the free-standing program. She also knew Brothers understood the VA system, worked well with the other staff surgeon, and was well-liked by the patients. Brothers said she needed to consider the offer in light of her other employment committments and would reply within two weeks.

On January 13, 1981 Brothers told McAnaw she would like the job, as she wanted to consider a career in surgery in the VA. A completed job application was taken to the Chief of Staff's office on January 15, and reference letters were requested and received. McAnaw had previously hired four or five other surgical staff physicians in the same fashion and fully anticipated that a Professional Standards Board (PSB) would soon to held to review the application and set a salary step and grade.

On January 22, 1981 Brothers received a telephone call from the Center Director, who requested a meeting with Brothers and the Chief of Staff. She said they wished to ask Brothers about extending her part-time hours to cover for the McAnaw maternity leave in March-April. Brothers agreed to meet with them on January 28. Brothers now sensed there was trouble with her pending job confirmation, and she called McAnaw to ask what was going on. McAnaw told her she had just been called to meet with the Chief of Staff and Director and was told by them they did not wish to hire Brothers for three reasons:

1. Brothers had trained at Leavenworth,

2. Brothers had a "negative attitude" as a resident, and,
3. Brothers would be "too loyal to Surgery".

McAnaw was also told a decision had been made in the Front Office to advertise for additional job applicants and the PSB would be held up until more had been received. Brothers decided at this time to document all events to protect her committment to the job.

On January 29th Brothers arrived for the meeting and found only the Chief of Staff present. He asked if she would consider extending her work days to help out during the maternity leave and declined to discuss her qualifications for the job opening. Brothers said she had understood that McAnaw's offer and expectation of a PSB on the application was the usual hiring procedure in Surgery at that time. The Chief of Staff said that he was advertising for additional applicants. Brothers asked for, and received, permission to talk to the Center Director.

On January 29, 1981 Brothers and her husband met with the Center Director for thirty minutes. Brothers had arranged to tape record the meeting (as she had done with the Chief of Staff the day before). The Director proceeded to make numerous derogatory comments about McAnaw, and the Surgical Service, and alleged that McAnaw was considered a problem by herself and the Chief of Staff. McAnaw was said to work against Administration. The Director stated she felt Brothers would be unwise to take a job in that atmosphere and, "I don't know what kind of career you're going to have in the VA". She also asked Brothers why she had just been invloved in meeting with a site investigator, detailed out from Central Office on January 12th, when she had come "...to see what's wrong with McAnaw versus the world", and then asked Brothers about the "anonymous letter" that "went in to Central Office...about Dr. McAnaw being so wonderful and everybody on Administration being against her".

When Brothers replied she knew nothing about an "anonymous letter" the Director said, "There were even people who thought you might have been participating in this". The Director then reiterated the intent to TWX the VA to look for job applicants, and the intent to advertise, but she closed by saying if none were found Brothers would then be "the first one I'll turn to". She asked for a "two week grace period" in which to arrive at a further decision and Brothers agreed to this at the close of the meeting.

Other Investigations:

Subsequent to this meeting several additional "investigations" occurred at Leavenworth throughout the Spring and Summer of 1981 (Appendix E). Brothers proceeded to contact the staff of Sen. Bob Dole, and former Kansas Rep. Jim Jeffries. The Dole staff also called in the staff of Sen. Nancy Kassebaum. All three congressional staffs became interested in the situation at Leavenworth and pushed for a full I.G. audit. Brothers, working with local contact persons (VA employees and an attorney), brought in representatives of both the VFW and American Legion (much to her later dismay).

The investigation conducted by the Medical I.G. in April of 1981 concluded that Brothers was not the ideal candidate for the surgical job, and recommended that the VA seek a "board-certified surgeon...of broad experience". It was suggested that Brothers be notified of this, and she did receive a letter from the Chief of Staff, dated April 27, 1981, containing the same language as the I.G. report.

Although the draft report of the Eastern Field Office of Audit of the I.G., from June of 1981, found substantial problems with the Anafranil study (among other things, that the Chief of Staff's wife was an unnamed co-investigator, and problems with allocation and use of study fund monies) most of this information was not included in the Final Report which was eventually released in October of 1981.

Retaliation Against McAnaw:

By late 1981 Leavenworth VA Administration was in the process of removing McAnaw from the Center. She had been charged with being "AWOL" during her maternity leave, and was harrassed regarding notice of leave and return to work dates. A list of ten charges (Appendix F) was drawn up through VA Central Office. The thrust of the accusations was that although McAnaw was an excellent surgeon, she was a poor administrator. She received a poor proficiency rating for the first time in her twelve year plus VA career, and this was followed by a second poor rating, both written by the Chief of Staff and confirmed by the Center Director. This is of particular interest in view of the fact that on January 10, 1980, just weeks prior to her Anafranil allegations, she had received a letter from the Center Director appointing her to chair the Medical District #22's Service Chiefs Committee for Surgery. (Appendix G)

McAnaw eventually sought legal counsel, and initiated action to combat VA's attempted removal. In April and May of 1982 a five day "4110" Hearing was conducted by a Disciplinary Board regarding the ten charges brought against McAnaw. This hearing, McAnaw's final appeal within the VA system, was limited to the ten charges against McAnaw. McAnaw was able to provide twenty-two witnesses, in contrast to only two for the VA (the Chief of Staff and a former Supply Service Chief). The Board prohibited any attempt to present the Anafrnil issue as a theory of retaliatory activity by the VA, allowing only peripheral testimony. The Mt. Healthy v. Doyle case was quoted by the Board's technical advisor as a reference. McAnaw's attorneys were seriously hampered, in addition, by the failure of the local VA, or VACO, to provide requested documents relating to the material of the charges in a timely fashion prior to the hearings. None of the major "investigative" reports (e.g., Lindsay, Vilinskas, Eisman, Hughes, etc.) were received as requested. Some have not been seen to this date.

When VACO finally released the 4110 transcript in the Fall of 1982, the two thousand plus pages included dozens of pages of commentary by the Board Chairman which impressed McAnaw and Brothers' attorneys as being overly defensive of the VA and biased against McAnaw. The Board decision, received on September 10, 1982, ultimately upheld all ten of VA's charges, and recommended McAnaw's demotion/transfer from the position of Chief of Surgery to Kansas City VA Center.

By this time (June 26, 1981) McAnaw had filed a lawsuit against the VA in the Tenth Circuit Federal Court in Topeka, Kansas. A temporary restraining order issued by Judge Richard Rogers was ultimately reversed, allowing a transfer to a position as a staff surgeon at the Kansas City, Missouri, VAMC, to occur on April 4, 1983. McAnaw's attorney had attempted to approach the Office of Special Counsel for an injunction against a transfer but was told it was not within OSC's authority to do this. OSC proved frustrating to work with, continuously changing investigators, and even the site of the responsible investigating office from Philadelphia to Washington, and back again. McAnaw testified about her frustration in dealing with OSC at Hearings on Whistleblower Protection sponsored by Rep. Pat Schroeder on June 18, 1985, and Brothers provided a written statement for the record. (Appendices H and I, respectively)

Brothers' Legal Action:

By 1982, one year after she had accepted the job offer, it was obvious that the VA had no intention of hiring Brothers for the staff surgeon's position. No one had been hired, and two series of job advertisements had been run in professional journals. Following the Medical I.G. report's recommendations the job ads had been changed from "board elligible/certified" to "board certified". Two additional local requirements considered at one point were "not locally trained" and "US citizen". The Chief of Staff created a Search Committee in PSB to seek a surgeon, yet the members were trained in nuclear medicine, radiology, and also included the psychiatrist in charge of the Anafranil study! No surgeon was on this committee to screen surgical job applications. A meeting was held to set up "points" by which to screen the applicants for consideration; under this system Brothers' "score" was "zero".

In ACpril, 1982, Brothers decided to file suit against the VA (April 15, 1982). The suit was a Biven's action under the First Amendment to the Constitution, and was also filed in the Tenth Circuit Federal Court in Topeka. By this time the entire case had been "combined" by the attorneys for McAnaw and Brothers.

Defendants' Motion to Dismiss, filed on November 11, 1982, cited both the Bush v. Lucas case and the issues of sovereign and qualified immunity for government officials as reasons to dismiss. Defendants' Supplemental Motion to Dismiss, filed March 30, 1984, relied heavily on the Bush v. Lucas loss in the Supreme Court to argue that a Biven's action cannot be brought where other sanctioned remedies exist. The motion reads, in part, "Here, the plaintiff may initiate a proceeding under the Civil Service Reform Act (hereinafter CSRA) by contacting the Office of Special Counsel pursuant to 5 U.S.C. 2302(b)(8). This same remedy was available to the plaintiff in McAnaw." (page 3 of Supplemental Motion) Plaintiff's Motion (against dismissal) was filed on June 24, 1984.

CSC Investigation:

Due to the complexity of the Leavenworth situation the OSC considered the Brothers' allegations as a correlative to the McAnaw case which had been addressed to them. An investigator finally became active in the matter on May 25, 1983. Working with a colleague, he made several visits to Leavenworth and interviewed a number of individuals. He specifically visited with Brothers on 5/25/83, 6/6/83, and 6/8/83, and by means of numerous followup telephone conversations. Brothers was requested to provide various items of documentation. Among the materials requested, and provided, were the following:

1. Brothers' husband's written notes of the 4110 Hearing,
2. Press file,
3. Final FDA Report in the Anafranil investigation, and,
4. VA's SIRP report-notes from the 4110 Hearing.

Toward the end of the OSC involvement Brothers revealed to CSC the existence of certain tape recordings and transcripts which she had made. On May 3, 1984 CSC requested this material also. Brothers complied with this request after considerable thought, not being certain of the intentions of the OSC, or whether such items might be shared with the VA Central Office.

Outcome of McAnaw Case:

On July 18, 1983 the *McAnaw* suit went to trial in Topeka before Judge Richard Rogers. By this time it had been restricted to an EEO-type sex (gender) discrimination complaint, and an A.P.A. review. Proceedings were severly restricted by the *Bush v. Lucas* loss in the U.S. Supreme Court with the decision having been rendered just weeks before *McAnaw* went to trial. Roger's decision did not appear until October 22, 1984. It concentrated on an analysis of the VA 4110 Disciplinary Hearing and the ten charges levied against McAnaw and concluded, "The court is also stating that plaintiff had a full opportunity to rebut the charges and received a fair hearing by the disciplinary board".

Following the Court's decision in the *McAnaw* case the decision of the OSC was received. By letter dated January 30, 1985 OSC declined to prosecute the McAnaw case, although "...we believe she engaged in protected activity." The OSC also stated, "...we would be unable to overcome the agency's defense that she would have been demoted or reassigned notwithstanding her disclosures". The "but/for" test of *Mount Healthy...v. Doyle* is again cited in this letter. In addition, it was felt that the preceeding Court decision also weighed against any OSC action (Appendix J)

After some discussion with the attorneys McAnaw decided not to appeal the Court's decision. At the present time she continues to work at VAMC, Kansas City (an 80 mile round-trip commute), having been promoted to Assistant Chief, Surgical Service, on August 2, 1984.

Outcome of Brothers' Case:

Following the filing of the Biven's suit in 1982 the VA filed motions attempting to limit and severely restrict the *Brothers* suit by using the Bush v. Lucas decision as a foundation, and by arguing that no Federal employee has a right to a B[iven's action. Following the exchange of Motions for, and against, dismissal in 1984 Judge Rogers issued a Memorandum and Order on June 30, 1986 in which he stated that the Brothers case would be allowed to proceed to court using a Biven's claim with respect to the First Amendment (Appendix K) After some additional delay by the VA a jury trial was conducted in the Tenth Circuit Court, Topeka, Kansas, before Judge Rogers, from January 5-9, 1987. Brothers was finally able to present most of the theory of retaliation for speaking out about the Anafranil issue, and witnesses included McAnaw and the psychologist who initially identified the problem. The former Center Director denied having asked Brothers about the 'anonymous letter" during her testimony, and Brothers was able to testify in rebuttal as to the existence of the tape recording of this crucial conversation. VA presented extensive testimony regarding the plans for the surgical training program at Leavenworth, and attempted to make the case that Leavenworth was involved in a transition to full affiliation with the University of Kansas Medical Center throughout the entire hiring search, and, therefore, could only hire surgeons with the concurrance of K.U. Testimony was also heard regarding the surgeon eventually hired on November 1, 1982, who had been on probation with the Kansas State Board of Healing Arts prior to coming to Leavenworth VA Center. Although the VA pointed out that, in their opinion, they could not hire Brothers due to lack of Board certification it was noted that Leavenworth VA had, as recently as 1986, hired K.U. graduates right out of training with no Boards, and no years of practice before coming to the VA. Brothers also noted that, subsequent to the hiring of the third staff surgeon, Leavenworth VA hired a staff urological surgeon and, during that job search, the advertisements again read "board elligible/ certified".

On January 13, 1987 the jury rendered its verdict, awarding $90,937 in compensatory damages for salary loss, and assessing $50,000 in punitive damages against each of the two VA defendants, the Chief of Staff and former Center Director. The verdict is currently on appeal by the Justice Department and no ruling has been rendered by Judge Rogers at this time. Commentary on the verdict has appeared in the press (Appendices L and M)

Addendum:

Dr. Mary Brothers has changed careers, having completed a "Mini-Residency" in Occupational Medicine at the U. of Cincinnati from 1982-84. She has served as President of the Great Plains Occupational Medical Association, obtained a Fellowship in Occupational Medicine in January of 1987, and has just been appointed to the Ethical Practices in Occupational Medicine Committee of AOMA. She continues to practice in Kansas City, Missouri.

Dr. Mary McAnaw is currently Assistant Chief of Surgery, VAMC, Kansas City, Missouri.

The Chief of Psychology at Leavenworth VA decided to take early retirement after receiving his first poor proficiency rating in 43 years of Federal service from the Chief of Staff. He is now in limited private practice in Lawrence, Kansas.

The Staff Psychologist who first identified the Anafranil problem has been under increasing pressure to leave the Leavenworth VA. He is seeking assistance through the union, and goes to arbitration later this year.

Several other staff physicians who tried to assist Dr. McAnaw also received mediocre ratings and/or decided to leave the VA. They are now in private practice in various locations in the U.S.

In 1983 three of ninety-nine nurses at Leavenworth VA received critical comments on their performance evaluations from their supervisor. All three had testified for McAnaw.

The Anafranil study Director was censured by the FDA in their Final Report (June 23, 1983), as in the preliminary report of 1982, for "repeated or deliberate violations of regulations" in the conduct of the Anafranil study, and in a prior Ludiomil-Protocol 26 study. After signing an agreement not to engage in drug research he transferred to a staff psychiatry position at Topeka, Kansas, VA. He is now deceased.

The former Center Director, Leavenworth VA, accepted a transfer to VA's Regional Medical Education Center, St. Louis, Missouri, and is now retired.

The Chief of Staff, Leavenworth VA, is still in that position. His wife continues to work in the Psychiatry Service at Leavenworth.

Respectfully submitted,

Mary E. Brothers, M.D.

List of Appendices

A VA Vanguard, July, 1980

B Brothers' August 1, 1980 letter to the VA's I.G.

C Three indentifying sentences from the 8/1/80 letter to I.G.

D Brothers' October 28, 1980 letter to VA's I.G.

E List of investigations, Leavenworth VAMC

F 4110 Charges against Dr. McAnaw

G Center Director's January 10, 1980 letter to Dr. McAnaw

H McAnaw's testimony at Schroeder hearings, 1985

I Brothers' written statement for Schroeder hearings, 1985

J OSC Final Report on McAnaw, 1/30/85

K Judge Roger's memo of 6/30/86 in Brothers case

L Washington Post article on Brothers' verdict, 3/3/87

M May, 1987, editorial, VA Practitioner

STATEMENT OF MR. LAWRENCE TIMOTHY REID

Mister Chairman,

I thank you for the honor and the privilege of appearing before this distinguished subcommittee in its legislative deliberations for the strenthening of "whistleblower" protections for federal civil service employees. I hope to provide testimony which will clearly demonstrate the urgent need for enhanced intervention and enforcement by the Office of the Special Counsel in cases where federal employees bring forth objective criticisms or otherwise disclose information with the intent of improving the integrity and efficiency of government operations.

Today, I speak on my own behalf and express my own opinions. I am not representing, nor have I been briefed by, any Department of Defense officials for this appearance.

Seven years ago, I began my career with the United States Navy. I am proud to work for an organization with a history as rich and a purpose as noble as the Navy's is. In this statement I relate events in which, I believe, a small number of officials have abused the trust and authority granted them by the Navy; these instances of abuse do not, in any way, reflect the policies of the United States Navy.

In 1980, I was assigned, as an electronics engineer, to a submarine communications program referred to as the Sea Nymph systems [AN/WLQ-4(v)]. In this capacity, and through my responsibilities on this program, my colleagues and I began to witness examples of the irrational and inefficient methods of procurement which, for a variety of complex reasons, are utilized within the Department of Defense.

In July 1983, I began to report evidence of the poor performance and underqualification of a defense contractor responsible for the proper maintenance and certification of Sea Nymph systems. As recommended by the Navy, I initially disclosed my concerns through chain-of-command. Although my first-level supervisor concurred in 1983 with my allegations, other officials initiated a prohibited pattern and practice of adverse treatment clearly designed to discredit me and thereby discredit all disclosures which revealed indicia of poor management practices or wrongdoing. These reprisals included arbitrary investigations, unwarranted job transfers, character defamations and, eventually, my removal from the Sea Nymph program - not to mention a host of other strategems all intended to deter the effective resolution of my complaints. As I persisted through administrative channels to pursue appropiate solutions to these problems with management, the reprisals against me increased proportionately to include an unprecedented revocation of a security access, and, two more maliciously baseless investigations. This spring, representatives for Secretary Weinberger have acknowledged that the false charges against me were engendered from within my command - by officials responsible for investigating my disclosures. One official falsely advised the Secretary of Defense that I was a convicted criminal and that he should therefore disregard my complaints and withhold important information from Congress. He also disinformed the Navy and Defense Inspector Generals as to the credibility of my allegations. (Special Counsel failed to report these incidents.)

I have never, in my entire lifetime, been charged with any crime, although I have been tried by ordeal since July 1983 for performing my duty under law.

My greatest concern in these original disclosures was that the poor performance of the defense contractor involved did not jeopardize a Navy program known as the Sea Nymph Overhaul.

This program for the refurbishment of existing Sea Nymph systems had been in planning at my activity for many years by 1983. The Navy issued a report in November of that year (Program Plan for Overhaul of AN/WLQ-4(v) Systems) with the following recommendations

> " To ensure that the system overhaul program is executed within the implied schedule constraints and in a cost-effective manner, a centralized activity at (my Navy command) is proposed for the planning, the implementation, and the management of the program."

A Navy report of two months later estimated the cost of this program to be between 1.7 and 2.1 million-dollars per system for approximately 43 systems, or a total progam cost of about ninety-million dollars.

Over my objections and pleas, this identical program was later redirected to a defense contractor (not yet discussed here) at a cost far exceeding those costs estimated by Navy experts. In early 1985 a non-competitive contract award was provisionally planned to this contractor which could have cost over seven million-dollars for the overhaul of only one Sea Nymph system. At that rate, American taxpayers would have been paying over $200,000,000 more than the Navy originally had planned. [To a contractor then being indicted by the Justice Department for illegally conspiring to obtain and use sensitive classified Pentagon documents in order to get procurement contracts on electronic warfare systems (e.g.Sea Nymph). The Defense Department "fully supported the prosecution of the case" in which the contractor eventually pleaded guilty to the charge of "conspiring to convert the documents for their own use and to defraud the United States."] (Special Counsel failed to report these facts.)

In short, I had, and still have, substantial reasons for diligently advancing my concerns. So, after fruitless recommendations through my entire chain-of-command regarding the method and cost of these overhauls, I finally decided to contact my local congressman, The Honorable Jim Bates of San Diego, California.

Subsequent to inquiries by Congressman Bates, Navy reports were finally issued confirming that my allegations had surfaced problem areas within my command, including, but not limited to

" informal contract administration, questionable management planning, poor internal communications, serious questions with respect to the degree of interest and responsibility exercised by upper management ... vulnerability to fraud, waste of resourses, abuse of authority, mismanagement and lack of internal controls, especially in contracts administration" and ... "poor internal review investigations" into my disclosures, which the Navy, first received "in or about July 1983." A special contracts administration review and reform committee was initiated which verified and corrected even further problems. (Special Counsel chose not to report these facts.)

- despite even this - reprisals continued against me until I finally decided to request investigation and corrective action by the Office of the Special Counsel in January, 1986.

I contacted the Special Counsel with the intent of not only protecting my career, but also with the hope that they would protect the best interests of national security and the Merit Systems. I expected the Special Counsel to be an avenging angel; nothing could have been further than the truth. Their involvement in my case served only to augment reprisals against me and to further jeopardize the proper response to congressional inquiries regarding my disclosures.

From the outset of the Special Counsel investigation, beginning with their intake processing, I felt as if I was being run through a bureaucratic gauntlet. It required six-months of painstaking effort before the OSC intake officer finally decided that my case warranted a rarely-utilized field investigation.

In July 1986, a field investigator traveled to San Diego "to take a preliminary affidavit (of me) ... because (he) had not yet seen the Washington intake reports." I was advised by the field investigator, as was my legal counsel, that I was required to prepare a detailed legal brief for "the Special Counsel attorneys because (they) aren't trained or experienced in administrative law, only law school constitutional law." After complying to this overly-stringent direction with a 16-page legal argument (and thirty-one (31) evidenciary enclosures), it was completely excluded from the field investigator's references for the "Summary of Investigation". I can find no recorded review, reference, or application of this document, which was without question the singly most probative submittal to Special Counsel. Contrasted to the many patently insignificant, unsubstantial and inaccurate documents enclosed in the "Summary of Investigation", this exclusion manifests a severely flawed reporting, analysis, and decision process.

In September 1986, the field investigator selectively took affidavits of only those witnesses expected to support the management position I was challenging. He apparently entered into a blind trust with the charged officials, accepting all they said at face value, and reporting it as fact in ignorance of conflicting and more cogent evidence. He incited false statements regarding my work records, my disclosures, my credibility and my character. He then chose not to report the problems and wrongdoings previously, and later, acknowledged by the DoD while simultaneously including obviously false and malicious allegations. He also reportedly acted as counsel for management, to my detriment.

The most cursory examination of Special Counsel's summary report reveals a prejudiced investigation, faulty reasoning and colorable conclusions - presented in an dissembling and disingenuous fashion. When I was finally granted a partial copy of the Special Counsel file for this case, after congressional requests, I was appalled to discover that an organization with a mission so critical could be so ineffective. Perhaps, in my case, the field investigator was only "a loose cannon on the gun-deck of O.S.C." - to use a Northern expression - but this fact alone would not explain the arduous intake procedures I faced ... nor the overwhelmingly negative opinion among civil servants who have petitioned for intervention by the Office of the Special Counsel. My advise to federal employees considering their duty under law to report substantial wrongdoings or misappropiations would be not to do so under current legislation, unless they possessed the resources and credendials of an attorney, a Certified Public Accountant and an ordained saint.

I have been fortunate over the last four years. Through my efforts and experiences, and those of others, I have learned the most effective channels and procedures for disclosing and correcting serious procurement problems within government. I have also discovered some of the dangers and difficulties which can trap and betray a bona fide "whistleblower". I believe OSC can be one of those traps.

I am proud to say that in 1986 I used my experiences to benefit the United States by issuing a second set of disclosures, via Congressman Bates to the Secretary of Defense. The actions taken by Congressman Bates and the Department of Defense on these disclosures will result in saving millions of dollars at most of the sixty-six (66) government-owned/contractor-operated military facilities throughout the country. These disclosures were severely compromised and nearly rebuffed because of OSC's failure to act in the best interest of the government.

I thank you, once again, for this privilege. In particular, I would like to express my deepest appreciation to you Senator Pryor, to Congresspersons Jim Bates and Patricia Schroeder who have faithfully assisted me since 1985, and to the Department of the Navy.

STATEMENT OF JOHN K. SHIPOSKI
IN THE SENATE OF THE UNITED STATES
COMMITTEE ON GOVERNMENTAL AFFAIRS S.508

The opportunity to appear before the Senate Committee on Government Operations with Mr. Tim Reid is both an honor and a privilege. My experiences with the Office of Special Counsel began in 1979 as a representative of Federal Employees with the American Federation of Government Employees. In late 1985, a small group was formed in San Diego called the Whistleblower Intervention Network (WIN) in the hope of assisting Federal employees in their complaints against reprisal for what were believed to be protected activity disclosures. In early 1985, we were successful, through Congressional intervention, in causing the issuance of regulations by the Department of Defense in implementation of 1983 legislation by Congress in which Whistleblower protections were extended to over 177,000 non-appropriated fund government employees.

Prior to representation in Mr. Reid's Office of Special Counsel processing most reprisal complaints were rejected by Office of Special Counsel through the expedient of deferral to other sources as they determined that the complaint submitted could be resolved more appropriately under other agency appeal procedures.

From 1979 to 1983, three complaints were given field investigation but were closed without corrective action. The cycle of rejection led to a conclusion that the complainants were instead better served by petitioning Congress when their complaints disclosed evidence of waste, fraud or abuse of authority and ensuing reprisal.

In Ms. Reid's Office of Special Counsel investigation, conducted by a former civil service commission hearing officer, it became apparent that his concern with Congresswoman Schroeder and Congressman Bates' interest was a significant factor in what records now reveal to be an investigative attempt to discredit and impugn Mr. Reid's integrity. Those outer limits were reached while not requiring the agency to produce its own investigative reports or releasable records requested by Mr. Reid since 1983, through Freedom of Information Act petitions.

It became obvious from the file and report received in 1987 that the Office of Special Counsel was extending a significant measure of deference and partiality to Department of Navy management officials even though Mr. Reid's petition and complaint of Prohibitive Personnel Practices alleged, in part, that the agency's recalcitrance through delay, non-disclosure and disinformation was an abuse of authority and indicia of a retaliatory motive.

As the emerging anomaly of protecting the agency and not the complainant became painfully evident Senator Pryor was notified on July 6, 1987 that a significant omission was discovered upon closer examination of the OSC report of investigation and the file.

> The OSC report does not include or make reference to a supplemental complaint filing to Mr. Reid's original two page January 1986 filing and intake interview by the Washington, D.C. OSC intake officer.
>
> Although we provided extensive explanation of factual data to the intake officer, she advised that the complainant was required to explain and define the prohibitive personnel practices taken as a result of the alleged retaliation. She explained that any adverse treatment which followed the 1983 complaint disclosures would be considered but an explanation of prohibitive personnel practices was essential to any OSC determination. As a result of an incomplete complaint, her intake information would necessarily be confined to a staff analysis of section 2302(b)8 of the Reform Act. (Reprisal from certain disclosures which result in the taking or failure to take certain personnel actions).
>
> It was also known that OSC might not process a complaint to field investigation if it was determined that the complaint could be or had been resolved under any existing administrative appeal procedure. Since an administrative appeal hearing was conducted by the commanding officer in 1985, a brief was submitted to OSC which contended, in part, that the issue of retaliation in the taking of personnel actions against Mr. Reid had not been properly or appropriate resolved by the commanding officer as the administrative deciding official.
>
> The supplemental complaint was then drafted. It referenced that appeal exercise and alleged through code citations that the circumstances indicated the occurrence of further prohibitive personnel practices. The investigator accepted the complaint with the assurance that it would be a necessary part of his investigative inquiry. But the recent examination of the file provides no indication that the complaint was investigated or even considered. The failure to investigate those practices is contrary to the clear mandate of 5 USC 1206(a)1; Authority and responsibilities of the Special Counsel which states, "The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists or is to be taken."

> Because of the foregoing, Mr. Reid submits that the analysis of the OSC is fatally flawed because of that investigatory complaint suppression. Even the limited inquiry is slanted by the exclusion of key witness affidavits and perfunctory questioning of those few who were contacted. The consequences of the OSC decision has provided Mr. Reid's command with an affirmation, if not license, to continue a pattern of adverse treatment designed to vilify his performance and extinguish his federal service career. While the suppression of a complaint may be a form of cruel hoax upon a complainant, the OSC, correspondingly, makes a mockery of its own processing regulations and the Reform Act principles it has sworn to uphold and protect from transgression.

From the significant omission, the conclusion was reached that the Office of Special Counsel investigation was itself a reprisal for petitioning concerned and involved members of Congress for intervention and assistance.

The expanded protections that S. 508 introduces if enacted and publicized at an earlier time might have deterred the Agency's retrenchment against Mr. Reid's continuing efforts to prevent gross waste of government funds and overcome the Special Counsel's reluctance to seek appropriate measures of vindication and cessation of a demonstrated pattern of reprisal.

SB 508, in my opinion, rightfully defines and re-emphasizes the purpose of Special Counsel by designating its primary role to the protection of employees; it reverses a trend of non-enforcement that eroded the confidence employees who had or might have brought disclosures benefiting the efficiency and economy of government.

The provision under Section 1213 that would require the Special Counsel to obtain a formal report from the Agency head within sixty days would have allowed Mr. Reid to offer a rebuttal of pretext to the initial assertion that Naval expenses claimed were not valid and hence, subject to collection by an agency supervisor.

The Agency, most assuredly, would have been required to justify or reconcile that collection and the nexus to its subsequent personnel actions. Their rationale was submitted as contrary to comptroller general decisions and to its own past practices as applied to other employees similarly situated. They could not reasonably or validly demonstrate that grounds, independent of Mr. Reid's protected disclosures, did in fact exist.

Investigatory omissions, however, allowed the Agency to avoid proferring any such rationale for its actions; reasons that would not have withstood fair-minded scrutiny. To the extent that Mr. Reid and other employees have been placed upon "rocks and shoals" in their efforts to seek corrective action before the Special Counsel S.508 brings forth needed measures to ensure that OSC will truly become a safe harbor for disclosures of waste, fraud and abuse by requiring a serious investigation of such disclosures whenever they have merit. The efforts of the committee in this important legislation and the opportunity to present this statement for consideration are very much appreciated.

Respectfully,

John K. Shiposki

John K. Shiposki
Representative

JOHN K. SHIPOSKI
Box 7041
Chula Vista, CA 92010

July 6, 1987

Honorable David Pryor
United States Senate
Senate Office Building
Washington, D.C. 20510

Dear Senator Pryor:

Thank you for the opportunity that you have extended to Mr. Tim Reid to appear within your Senate Subcommittee hearings.

A significant omission was recently discovered upon closer examination of the OSC report of investigation and the file requested by Congressman Bates of San Diego. The OSC report does not include or make reference to a supplemental complaint filing to Mr. Reid's original two page January 1986 filing and intake interview by the Washington, D.C. OSC intake officer. That complaint has been mailed to you under separate cover.

Although we provided extensive explanation of factual data to the intake officer, she advised that the complainant was required to explain and define the prohibitive personnel practices taken as a result of the alleged retaliation. She explained that any adverse treatment which followed the 1983 complaint disclosures would be considered but an explanation of prohibitive personnel practices was essential to any OSC determination. As a result of an incomplete complaint, her intake information would necessarily be confined to a staff analysis of section 2302(b)8 of the Reform Act. (Reprisal from certain disclosures which result in the taking or failure to take certain personnel actions).

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Respectfully submitted,

John K. Shiposki

John K. Shiposki, Representative
for Lawrence Timothy Reid

JKS:ess

TESTIMONY OF

EDWARD E. WRIGHT, WHISTLEBLOWER COALITION

Mr. Chairman and Committee Members:

I am Edward E. Wright, a Washington attorney, appearing on behalf of the Whistleblower Coalition. The Coalition was formed in May 1987 by about a dozen Washington area whistleblowers for the purpose of making sound, joint recommendations for legislative reform in the hope of achieving significant improvement in government integrity and correcting the long record of injustice to whistleblowers. A list of Coalition members is attached (see Attachment 1). Each is well-known within the organization cited; each has suffered termination from government service, or demotion, and substantial injuries as a result of conscientious objection to official actions; most have been involved in lengthy legal proceedings in efforts to obtain redress. The Coalition members are a highly experienced group, with lengthy government, private industry, and university service present among its members. We have held long meetings for the purpose of exchanging ideas and developing effective, pragmatic, consensus recommendations to deal with the very serious problems before this subcommittee.

Early in its discussions Coalition members found they were in agreement on five basic premises. These premises underline our specific recommendations and are, as follows:

1. The national interest is served by whistleblowing. There is a compelling need in the national interest to see that misconduct and mismanagement in government

agencies is disclosed. To this end our laws should strongly encourage responsible, informed criticism of pending decisions and actions of U.S. agencies from within, and not encourage subservient conduct in the face of conscientious disagreement.

2. Retaliation is to be expected. The predictable response of supervisors and managers is not to receive internal criticism from subordinates constructively, but to cover-up harmful facts, and to seek to silence and remove critics and dissenters. The more serious or accurate the allegations, and the greater the power of those accused or responsible, the more likely it is that subordinates will face reprisals and experience severe career injury.

3. Protection must be realistic to work. Needed disclosures of misconduct and mismanagement within government ranks can be encouraged realistically only if internal criticism and whistleblowing activity are made safe and productive. This requires genuine free speech protection for open criticism, fully confidential channels for making accusations of misconduct, that all serious allegations of misconduct or mismanagement are carefully investigated by fully independent authority, and that unjustified reprisal actions be prevented if possible, and fully redressed when they occur.

4. Our present rules are a disaster. The legal rules and procedural system now in force in regard to internal criticism and whistleblowing activity are a colossal failure. They have operated to stifle disclosures of government misconduct and mismanagement and have caused massive injustice repeatedly to conscientious civil servants who have spoken out.

5. Major changes are needed. Major reform, not minor revision, is needed to achieve significant improvements in government integrity and to overcome the accumulated record of injustice inflicted on conscientious civil servants.

A basic conviction of the Coalition is that the type of "whistleblowing" activity needing protection is usually far less dramatic than the popular conception of a "whistleblower" as one who makes public revelations in a letter to the press, or in testimony before Congress. Most often the activity deserving protection is a strictly in-channel, low-key criticism of a superior's decision, or simply a refusal to obey an improper request. Few whistleblowers are publicity-seekers. They are driven to it only when the agency's response to a conscientiously taken objection is to center accusations on them, while doing nothing to investigate or correct the evil they have tried to stop. To emphasize this difference, our proposals urge a definitional distinction between a "whistleblower," defined as one whose accusations are made out-of-channel, and an "internal critic," whose dissenting activity is made only in-channel. In both cases, however, the Coalition feels strongly that genuinely protected Free Speech status should be given to government employees who express criticism of government policies, decisions, and requests sincerely when the criticism rises to the level defined in our recommendations as disclosing, or charging, "misconduct" or "mismanagement."

Congress believed in 1978 that legislation adopted that year would effectively protect whistleblowers. But court decisions and major deficiencies in the 1978 Civil Service

Reform Act have demolished this protection. Regretably, what is now needed is not legislative tinkering of a minor tune-up character. Our Coalition has been formed because the protection truly needed for whistleblowers and internal critics must draw instruction from the accumulated experience of reprisal, profound career injury, and deep injustice inflicted on government employees who have spoken out in recent years.

Our recommendations, which are 11 in number, are bold. They are bold only because they are designed to work. The recommendations are found in Attachment 2. They are based on the group's bitter, first-hand experience of the failures and shortcomings of our present system. Five of these recommendations are designed to curb the almost certain likelihood of reprisal actions against internal critics and whistleblowers. Three are focused on reducing discriminatory treatment of whistleblowers in the processing of agency personnel actions. The last three are designed to achieve just redress for whistleblowers wrongfully punished, and to overcome past injustice. I will not go into detail on the Coalition's recommendations, each of which is accompanied by a brief explanation and comment on S.508 provisions, but I would like to highlight how the recommendations relate to the basic premises of our Coalition.

Why protecting whistleblowing and internal criticism realistically will serve the national interest. Experience tells us that government agencies are run by highly imperfect human beings. Agency supervisors, including agency heads, often utilize their authority self-interestedly, corruptly, or unwisely. They may act improperly to befriend companies or individuals they are supposed to regulate in the public interest in order to obtain later employment. They may have few scruples at all about turning public trust into personal profit. Some are simply incompetent, occupying a position beyond their level of knowledge and skill for a variety of reasons, including political connections or past favors, yet they have responsibility for important or costly programs. They may be unfamiliar with controlling regulations, or with technical matters, yet be indifferent to learning them. They may adopt their own agenda, regardless of congressional directives, or pursue self-glorification bull-headedly by some ill-conceived policy. Only criticism and dissent from within-the-ranks of government agencies can possibly expose and hope to stop what is going on. Informed criticism from within, and whistleblowing when necessary, must be made safe to utter, or government agencies run by "yes-men" will forever fail to fulfill any high standard of performance.

Why reprisal actions almost inevitably occur under the existing rules. Common sense tells us, abundantly, that a supervisor or manager criticized by a staff member for misconduct or mismanagement, or whose order is not obeyed, is likely to use his authority to remove an "uncooperative" employee from his staff. Within management circles it is common for internal critics or whistleblowers to be viewed as "disloyal" subordinates, as "non-team" players, and as potential spoilers of the entity's "good image," to say nothing of management's reputation. Long prevailing legal rules have allowed U.S. agency management to proceed with the removal of annoying employees by a process in which accusations of misconduct or mismanagement are ignored, or not investigated objectively, while the self-interested manager or agency head accused of wrong-doing is not only not disqualified from initiating or approving an "unsatisfactory" performance rating, demotion, or transfer, but whatever he does is legally presumed to be proper and "regular". Further, the agency's legal staff jealously, and without cost to management, routinely enforces whatever course of suppression agency management decides upon, while the hapless employee, having few remedies at his disposal, must defend himself at great personal expense. The 1978 Civil Service Reform Act made the situation even worse by concentrating a monopoly of remedial measures in the Office of Special Counsel. The rules and principles already described, budget restraints, and hostile OSC personnel have assured a total failure of its mission. It is little wonder that covert but effective reprisal actions against conscientious employee critics are very much the rule, while offending officials invariably escape punishment. The result is a wrong-headed, morally corrupt system of dealing with internal agency criticism that is in need of profound reform.

Why greater protection against reprisal is needed than is contained in S. 508. The procedures contained in S. 508 will not protect internal critics and whistleblowers realistically from covert agency retaliation. First, under S. 508 an employee subjected to a reprisal action must rely on an OSC inquiry into his charges without benefit of any right to an independent, reliable investigation by any government body. He can obtain from OSC the dubious benefit of an OSC-ordered investigation by his own agency, but this will be controlled by the agency, is likely to be hostile, and OSC must be convinced there is a substantial likelihood a substantive violation of law, act of mismanagement, etc., has occurred. Add to this, time constraints, control of key documents and witnesses by the employee's agency, and a pronounced tendency for OSC inquiries into reprisal accusations to be conducted only perfunctorily since 1978, and the employee is at sea in a school of sharks. Second, only if OSC is persuaded of the substantial likelihood of a substantive violation need OSC try to obtain -- within its discretion -- a stay of any pending agency personnel action. Under this standard pathetically few stays have been sought by OSC in the past nine years. Alternatively, under S. 508 the employee can seek a stay of agency personnel actions from the MSPB directly, but to prevail he must establish a substantial likelihood of ultimate victory, with no benefit of an objective investigation into his changes. S. 508 simply does not contain proposals that seriously address the underlying problem. The Coalition proposes instead an automatic stay of all personnel actions against an internal critic or whistleblower when it is asserted they are taken in reprisal, and that this stay should continue in effect until a reliable,independent investigation into charges of misconduct or mismanagement is completed. Nothing short of this can possibly offer realistic protection against the probable, early commencement of agency retaliation.

Why Third-Party arbitration is proposed as a procedural right. The experience of whistleblowers with the Office of Special Counsel, the Merit Systems Protection Board, and the Federal Circuit as forums for relief against reprisal actions has been highly negative. Few whistleblowers have obtained effective redress from any of these bodies. While in substantial part this is explainable because of deficiencies in the conception of the 1978 Civil Service Reform Act, experience has consistently revealed a prejudice in the relief bodies mentioned markedly favorable to official U.S. Government explanations. This is perhaps because OSC, MSPB, and federal court personnel are federal officials themselves with backgrounds and roles likely to cause them to want to believe government attorneys and agency witnesses in preference to the critics and accusers of government agencies. But there is no sound basis for a presumption of agency regularity or a predisposition to believing that agency conduct is upright and correct. If anything, common sense and human experience suggest that keen skepticism of agency motives when acting against whistleblowers is called for. In any event, experience with independent third parties as arbitrators in federal employment disputes has revealed a far greater likelihood that whistleblowers will prevail before independent parties in a reasonable percentage of cases. If internal criticism and whistleblowing is to be encouraged, plainly, it must be perceived as a safe activity. This means that the dismal reputation whistleblowers have of nearly always losing their jobs and their cases must be reversed, in the popular mind and in reality. Accordingly, the Coalition applauds the fact that S.508 would erase OSC's monopoly on remedial actions and would confer an individual right of action on whistleblowers to sue for relief, but strongly recommends against confining such suits to the

MSPB. After an objective investigation has occurred and an automatic stay of personnel actions is at an end, if the agency continues to pursue a personnel action alleged to be in reprisal, then there should be no determination of factual issues involving such matters as satisfactory job performance under the old rules, by reliance before the MSPB on supervisors accused of misconduct or mismanagement, or employees subject to their direction. The facts should be determined by an independent third-party. If agency proceedings do not allow this then an optional resort to formal arbitration thereafter should be permitted.

Why massive injustice done to whistleblowers should be corrected. It is ironic that conscientious government employees seeking to stop abuses of government authority usually wind up as victims of a further abuse of power. Moreover, it is outrageous that our laws have tolerated this situation for so long. The massive injustice typically done to whistleblowers includes destruction of their government careers, severe injury to their professional reputations, to their psychic well-being, to their accumulated financial resources, and to their family lives. The injustice perpetrated has long rested at bottom on a nonsensical presumption of official regularity in personnel actions when, under any commonsense system of justice, the party accused of misconduct would be viewed as self-interested and certainly not allowed to sit as judge against his accuser. A stop to the creation of further victims of this medieval presumption should occur on an urgent basis. To accomplish this, the Coalition supports the major shift in evidentiary requirements needed to establish that a prohibited reprisal action has occurred, proposed in S. 508, but notes that S. 508 unwisely would allow an agency to pretend it had an independent basis for proceeding against a whistleblower even after reprisal conduct is established. This makes no sense. Additionally, S. 508 does not go far enough in regard to relief granted to victims. Such relief should include compensatory damages, and allow punitive damages against individuals in appropriate cases. Otherwise, the relief available to compensate for outrageous misconduct by a federal official will remain disproportionately shallow and incomplete.

Why retroactive relief should be granted. The Coalition also proposes that significant relief to whistleblowers injured by reprisal actions should be made available retroactively for a six-year period. The basis for this recommendation is three-fold: First, to avoid misunderstanding, this would not be a retroactive change of the rights between private parties, but a recognition that government officials have, in many cases, inflicted unjustifiable injury on other government employees. It is appropriate for the U.S. Government to accept retroactive responsibility as it often has long after military actions have ceased. The Federal Tort Claims Act, which broadly establishes government accountability for certain actions by government employees, was itself given retroactive effect in 1949 when first adopted. It is logical for a program of redress for government-inflicted injury to compensate past as well as future victims. Second, there is no doubt that many individual whistleblowers have unjustly suffered as a result of reprisal schemes. The national conscience would be served by recognizing their entitlement to justice at long last. Third, there is an urgent need for change in the popular perception of whistleblowers as losers if such activity is to be given meaningful encouragement. If new rights are established only prospectively, federal employees will react with skepticism to any claim that a new day has dawned for whistleblowers. This, after all, was the claim madein 1978. But if the new act yields early, concrete results in correcting past injustice, the message that Congress is serious this time around will be heard as effectively as possible.

On behalf of the Coalition I wish to thank you for this opportunity to express our views.

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Whistleblower Coalition Members

Name	Agency with which associated
Alvin Frost	D.C. Government
J. B. Halldorson	U. S. Forest Service
Arthur E. Hinton	Federal Communications Commission
Richard Krodel	Social Security Administration
Vincent A. Laubach	Department of Interior
Irvin H. Mason	Panama Canal Company/ Department of the Army
Phyllis Mason	Canal Zone Government
Herman Rivera	Commerce Department
Mark Price	Education Department
Dr. Floyd Stanek	Department of Transportation
Dr. Carl Telleen	Department of Agriculture

Basic recommendations of Whistleblower Coalition for effective reform:

Definition of terms:

"Misconduct": wrongdoing by a U.S. government employee involving violations of law or other legal obligations, venality, fraud, or inadequate concern for human lives and public safety.

"Mismanagement": misjudgment by a U.S. government supervisory or managerial employee involving errors of omission or of commission causing or leading to substantial waste of funds, failure to enforce a requirement of law, or decision-making without proper attention to important information affecting program performance.

"Internal critic": a U.S. government employee who expresses sincere criticism of agency policies or decisions on asserted grounds of misconduct ormismanagement to a higher ranking employee having some degree of responsibility for the matter criticized.

"Whistleblower": a U.S. government employee who makes accusations of misconduct or mismanagement against another U.S. government employee by reporting information or charges to a government investigating authority, to the press, to a Member of Congress or congressional employee, or to any individual with authority to act or follow-up on the information or charges.

I. To reduce reprisal actions against internal critics and whistleblowers at the outset:

1. Confidential channels for allegations of misconduct. Channels of communication must exist for federal employees to report misconduct in which privacy and confidentiality are fully protected. Comment: Safe channels do not exist at this time. S. 508 would still give OSC discretion to reveal the employee's identity, and does not bar IG and other name releases.

2. Free Speech Protection. Allegations of misconduct and mismanagement and internal criticism of agency decisions and policies should be treated as privileged free speech exercised in the public interest. Comment: This right is not presently recognized. S.508 would correct this situation only partially by inadequate protections unlikely to be effective.

3. Reliable follow-up to allegations. Allegations of misconduct must be assured of a follow-up that will include a reliable and fully independent investigation of charges made, with an adequate explanation given on request to the whistleblower whenever an investigation is dropped or corrective action not taken. Allegations of mismanagement made in writing should be reported to Congress by the agency, investigated by non-involved, qualified personnel, and agency reports subjected to GAO audit. Comment: These procedures do not presently exist. S.508 fails to assure an adequate independent investigation follow-up since OSC first must be persuaded to investigate, its investigations have seldom been vigorous, and if it directs an agency investigation this will be controlled entirely by the agency.

4. Automatic Protection against adverse personnel actions. During the pendency of unresolved charges of misconduct or mismanagment, and where an internal critic or whistleblower alleges that reprisal action has been initiated to forestall or punish his conduct, an internal critic or whistleblower should have the right to prevent any adverse personnel action from being processed. Comment: This right does not presently exist. S.508 would allow a stay of agency action to be requested but under a cumbersome procedure unlikely to work effectively except in a few cases.

5. Appropriate sanctions and rewards; Agency Reports. Officials guilty of misconduct or serious misjudgment must not escape appropriate sanctions, and whistleblowers must receive appropriate favorable recognition of their contribution to government integrity, including awards and promotions. Agencies should be required to report to Congress annually accurate

statistics on all instances of internal criticism and whistleblowing and their achievements in encouraging effective internal criticism and whistleblowing and punishing reprisal action. Comment: This procedure does not presently exist. S.508 would not significantly change the existing situation.

II. To reduce discriminatory treatment of whistleblowers in the processing of agency personnel actions:

6. Independent third party determination of factual issues. If investigation results confirm any significant portion of the allegations made by an internal critic or whistleblower all pending personnel actions against the employee should be nullified. Where an agency, after investigation into allegations of misconduct or mismanagement, is not prohibited from, and proceeds with, a personnel action against an internal critic or whistleblower that is challenged by the employee as a reprisal action, controlling factual matters (e.g., quality of the employee's performance; agency reason for transfer) should be subject to review by an independent third party who is not subject to direction by the employee's supervisor or by an official accused or criticized. Comment: Such review now exists for many employees thru the grievance/arbitration clause in federal collective bargaining agreements. The procedure should be made universal in recognition of the likelihood of reprisal actions. S.508 fails to address this need.

7. "Substantial" evidence of reprisal motivation. "Substantial" evidence that an adverse agency personnel action, or prohibited personnel practice, is taken, or threatened, against an internal critic or whistleblower in reprisal for protected activities, should be sufficient to void the action or practice. Comment: For too long there has been an unrealistic burden of proof applied to establish the presence of reprisal motivation based on a presumption of agency regularity. S.508 appears to contain a much needed change that would correct the previous evidentiary rule, but unwisely would allow disguised reprisal actions to continue by giving agencies an opportunity to concoct evidence

showing an independent basis for an adverse personnel action.

8. Office of Special Counsel should be abolished, or there should be fully equal rights to government counsel and resources. On the record, there is no reason to believe that the Office of Special Counsel will ever be effective, hence it should be abolished. In its place, the changes in Recommendations 1 thru 7 and 9 thru 11 are more promising. If the idea of providing government counsel to whistleblowers is to be continued, however, then there should be an entirely even regularity or of superior entitlement to government counsel and resources should exist. Comment: It has been destructive of past whistleblower rights to give an ineffective, understaffed, hostile office control over these rights. S.508, would leave OSC understaffed and ineffective, and continue a disequal treatment of the parties not supported by any logical basis or the public interest.

III. To establish just redress for whistleblowers and overcome past injustices:

9. Appropriate redress. Appropriate redress for internal critics and whistleblowers injured by reprisal actions should include: (a) full back pay, (b) reinstatement to prior position, (c) recovery of attorney fees and all costs of litigation, (d) recovery of compensatory damages for particular injuries suffered, (e) an official reprimand or other, greater sanction against responsible officials, including assessment of personal, and/or punitive damages if an oppressive or malicious reprisal action has occurred. Comment: Redress has been systematically denied whistleblowers and internal critics for years. S.508 confers an individual, private right of action long overdue but fails to include remedies (d) and (e).

10. Arbitration. Unless at the agency level an independent, third party resolution of disputes is offered, a choice of forum thereafter should exist for internal critics and whistleblowers which allows them to elect to proceed to arbitration under the rules of the American Arbitration

Association. Comment: S.508 would confer an independent right to sue but before the MSPB only, a forum that has been notoriously unprotective of whistleblowers. Whistleblowers are entitled to a fair, impartial forum where their rights will be adequately protected to serve the public interest.

11. Redress for past injuries. To overcome past injustice to whistleblowers and internal critics, the proposals encorporated in Recommendations 7, 9, and 10 above (except as to non-government liability in Recommendation 9) should be applied retroactively to reprisal actions initiated in the past 6 years, or made the subject of agency proceedings or litigation finally determined within the past 6 years. Comment: Significant change can only come about through a widespread perception of a serious, major improvement in the rights of whistleblowers and internal critics. Overcoming past injustice perpetrated by government officials on federal employees is desirable in itself and the publicity attendant on recoveries would act forcefully to enhance the likelihood of future disclosures of misconduct and mismanagement. S.508 does not address this problem.

QUESTIONS SUBMITTED

BY

SENATOR DAVID PRYOR

Edward Wright, Counsel to the Whistleblower Coalition

1. On page 12 of your testimony, you call for allowing the MSPB to grant compensatory and punitive damages against individuals in "appropriate cases."

   What standards should be used to trigger punitive damages?

   Should the size of the damages be limited--if not, would damages be treble, as in the False Claims Act?

   Would damages be awarded to the victim or to the government?

2. On page 9, you recommend an "automatic stay of all personnel actions against an internal critic or whistleblower," until an investigation is completed.

   What will keep a dishonest employee from using this to circumvent a legitimate personnel action given that some investigations could take two or three months to complete?

3. On pages 10 and 11, you call for third party arbitration of whistleblower disputes.

   Who would be the arbitrator--an outside person or a board created by law?

   At what point in the administrative remedy process would arbitration begin? Would it be the first route of appeals or would it be after the OSC or MSPB has turned the case down?

   Would the arbitration be binding or appealable to the federal courts?

MR. WRIGHT'S RESPONSES TO WRITTEN QUESTIONS SUBMITTED BY SENATOR PRYOR

Response to Question 1.

The Toxic Substances Control Act, at 15 U.S.C. 2622, and the Safe Drinking Water Act, at 42 U.S.C. 300-j-9, contain "employee protection" provisions making it unlawful to discriminate or to retaliate against a whistleblower, and provide as remedies for a violation: "(iii) compensatory damages, and (iv) where appropriate, exemplary damages." No further specification is needed since under traditional common law principles, "punitive" or "exemplary" damages (different words, having identical meanings) where authorized are limited to instances involving "malicious," "oppressive," or "gross" misconduct by the defendant. Our recommendation is to apply traditional common law standards.

Since damages would be paid either by the United States government (in the case of compensatory damages) or by an offending individual (in the case of punitive damages) it would appear inappropriate to double or treble the damages. Treble damages as a remedy is more suitable in circumstances (such as the False Claims Act, or anti-trust cases) where offending corporations are defendants. For essentially the same reasons, damages in whistleblower cases should be awarded to the victim, not to the government.

Response to Questions 2 and 3.

Since submitting our 11 recommendations to the Subcommittee on July 20, 1987, including these two, we have had an opportunity to study the recommendations of the Coalition to Stop Government Waste submitted on July 31. Both Coalitions have strongly recommended achieving more realistic protection of whistleblowers by an "automatic stay" of any adverse personnel actions, or by automatic "immunity," at the outset of proceedings, and by binding third party arbitration of factual questions concerning quality of the whistleblowers' job performance and the possible presence of retaliatory agency motivation. The two Coalitions differed in their recommendations only in two respects: the timing of arbitration, and the timing and procedure for obtaining a formal investigation into whistleblower charges of substantive agency misconduct or mismanagement. The Whistleblower Coalition's recommendations emphasized securing a reliable official investigation at the outset, with arbitration of personnel issues to follow only if required. The Coalition to Stop Government Waste recommended a fast-track arbitration of pending or incipient personnel issues at the outset, with substantive questions concerning agency misconduct or mismanagement to be within the arbitration panel's advisory (but non-binding) jurisdiction; if panel findings lent support to a whistleblower's substantive charges, then presumably an official investigation likely would follow (but implementing mechanisms are not specified).

After studying the approach of the Coalition to Stop Government Waste, and giving consideration to the desirability of avoiding conflicting recommendations to the Subcommittee where possible in good conscience, the Whistleblower Coalition has decided to endorse the recommendations of the Coialition to Stop Government Waste with modifications. The modifications we see as needed are to strengthen mechanisms for assuring an eventual, reliable, official investigation into substantive whistleblower charges, and to make clear certain whistleblower procedural rights before arbitral panels. Accordingly, the Whistleblower Coalition now supports the 50-day-initial-immunity-with-accompanying-arbitration legislative proposal of the Coaltion to Stop Government Waste. It is our intention to confer as soon as possible and, hopefully, offer jointly-approved specific legislative language for the consideration of the Subcommittee.

In the meantime, our preliminary responses to questions 2 and 3 are:

There is nothing to prevent a dishonest employee from attempting to circumvent, or delay, a legitimate personnel action by making whistleblower accusations that would confer on him temporary immunity, but outweighing this are the following factors: (a) the "whistleblower" label has consistently meant career death thereafter to an employee; no employee is likely to make whistleblower accusations lightly because of the serious repercussions to him personally that will follow; (b) without immunity protection, whistleblowers will continue to be routine victims of reprisal actions as in the past, and potential whistleblowers will continue in large numbers to be suppressed; the temporary protection is justified in light of past experience, and necessary to achieve the overriding objective of encouraging disclosures of government misconduct and mismanagement to be made; (c) a 50-day, fast track approach ending in arbitral findings will give government agencies adequate protection against charges dishonestly made.

The type of arbitration proposed would be similar to that now carried out in arbitration proceedings before the American Arbitration Association. While a single arbitrator is frequently used, it is also common in more difficult cases for a panel of three arbitrators to be employed, each side selecting a panel member, who together choose the third arbitrator (with an advance procedure for resolving deadlock). It is envisaged that the arbitrators would be independent, non-government personnel chosen from a list of qualified, knowledgeable, impartial experts prepared by a non-profit organization national in scope. The findings of the arbitrator or arbitral panel would be final and binding on all agency personnel matters affecting the whistleblower (*i.e.,* job performance, presence of agency motivation to retaliate, etc.), but would be advisory only in regard to substantive charges of misconduct or mismanagement by other agency personnel. There is normally no appeal to any court from binding arbitration, except in regard to limited legal questions (e.g., the jurisdiction of the arbitrator). The arbitration envisaged would be independent of any OSC or MSPB proceedings.

TESTIMONY OF

THOMAS DEVINE, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. Chairman and Committee Members:

Thank you for inviting my testimony today. My name is Thomas Devine, and I am the Legal Director of the Government Accountability Project (GAP), a non-partisan, non-profit legal support organization for government or corporate employees who challenge illegal, abusive, dangerous or wasteful misconduct where they work. On March 10 I testified on the similar House version of this bill. In order to avoid duplication that testimony is enclosed as Exhibit 1, and this submission will concentrate on significant new developments reinforcing the need for reform.

Particular thanks also are due to the Senate's lead sponsors for the Whistleblower Protection Act, Senators Levin and Grassley. Senator Levin's staff has been tireless in researching and analysing the need for statutory reform, as well as in developing free speech issues as an integral part of the Senate's advice and consent duty for executive branch nominations. Senator Grassley reaffirmed his commitment to free speech last session through joining Senator Levin in unwavering advocacy with of this bill in the face of threatened veto recommendations from Assistant Attorney General Bolton of the Department of Justice. He also led the successful fight to pass what is now the nation's strongest whistleblower law, protecting those who assist in False Claims Act suits to defend the taxpayers against fraud.

Your hearings could not be more timely. As recent testimony by Colonel North, Admiral Poindexter and Secretary

Shultz revealed, our nation faces a serious threat from secret government -- an elite group of bureaucrats who decide when the Congress and the public is entitled to know the truth, and who don't even share with the President the difference between fact and fiction. There were even proposals for a "secret" CIA that could be government without any accountability.

A little-noticed but highly significant factor in the Irangate crisis is that it took a disgruntled Arab arms trader and a Lebanese journalist to expose this sordid affair. Why didn't any of the federal employees who had to know about this illegal foreign policy blow the whistle? The answer is they've been gagged. The administration has engaged in an assault on freedom of speech in the executive branch, unprecedented in its intensity at least since the Malek Manual of the Nixon Administration. Most disappointing, the administration largely has succeeded in silencing the civil service system. Irangate reveals that -- 1) the administration has dried up the flow of information to Congress about even grossly illegal activities and brazenly dishonest disinformation campaigns; and 2) under secret government the interests of ordinary American citizens are sacrificed for lawless goals that our elected leaders dare not share with the voters.

STANDARD FORM 189

Recently GAP received a lesson in how the administration is functionally eliminating freedom of speech in the executive branch. Our client Ernest Fitzgerald, whom we believe is the most effective public servant to fight military fraud over the last 20 years, was informed that he and his partner Colin Parfitt, whom we also represent, will lose their security clearances unless they sign something called Standard Form 189. SF 189 is an open-ended gag order in which employees sacrifice their rights under the constitution and the whistleblower provisions of the Civil Service Reform Act -- the same laws this committee is trying is strengthen through these hearings and proposals. A copy of the gag order with new clarifying regulations, and Messrs. Fitzgerald and Parfitt's written questions about what it means are enclosed as Exhibits 2A and 2B.

The roots of this gag order are from the National Security Council, and a presidential directive that grew out of work by Messrs. McFarlane and Thompson -- two cogs in the secret government that disclosed sensitive information to our enemies but refused it to the Congress. To illustrate how far the repression has advanced, the Information Security and Oversight Office (ISOO), which monitors implementation of SF 189, estimates that two million out of the three million eligible federal employees have signed this form. Although SF 189 first appeared in 1983, signing it has only been mandatory throughout the executive branch recently, such as since April 28, 1987 at the Air Force. Despite the President's endorsement of the Tower Commission recommendations, the new orders to sign SF 189 raise questions whether the administration's response to Irangate may include intensifying the level of repression in the executive branch.

What have these civil servants agreed to? In terms of liability, violating the contract can result in loss of security clearance and jobs, or even criminal prosecution. In terms of obligations, the contract --

1) forbids the employee from disclosing to any unauthorized person "classifiable" information, which by its terms can include arguably anything.

Even declassified information is not safe to disclose. Pentagon regulations give broad discretion to reclassify information. SF 189-A, a companion form for defense contractor employees with security clearances, and previous laws only cover "classified" information. This open-ended gag cancels out the protection under 5 USC 2302(b)(8) for those who blow the whistle on illegality or other misconduct. It also would erase numerous other whistleblower provisions, such as those in last year's False Claims Act amendments. New regulations purportedly "clarify" the definition but in fact permit after-the-fact classification for such all-encompassing loopholes as prior failure to classify due to "error, oversight, negligence" or other excuses.

2) fails to define who is "authorized" to receive classifiable information, which raises questions about the status of congressional recipients.

The answers are chilling. In discussions with GAP, the ISOO Director explained that while members of congress and their staffs are cleared for receipt of classified information, they are not authorized to receive it directly. First the employee must submit to agency screening and clearance procedures. As a result, Congress could not receive "classifiable" information unless the agency first knows and approves. This would eliminate

5 USC 7211, which protects the right to communicate with Congress. GAP also has been informed that under recent ISOO regulations, congressional personnel could be required to sign SF 189. 32 CFR 2003.20(d).

3) holds employees liable for "indirect" unauthorized disclosure, which could eliminate the flow of information to Congress by subjecting civil servants to prosecution if their direct disclosures to Congress were later shared with someone unauthorized.

New regulations require an intent to circumvent the nondisclosure agreement. Unquestionably, however, there will be a chilling effect if whistleblowers are subject to criminal indictment and trial on their motives for communicating with Congress. This provision also violates 5 USC 7211.

4) permits prepublication review of covered information in order to seek court injunctions against its release.

5) fails to independently provide due process rights in determining whether security clearance should be revoked for violating or failing to sign the agreement.

The ACLU, while recognizing the right of the government to properly classify, has called for recission of SF 189 as unconstitutional. (Exhibit 2). This subcommittee and numerous other congressional offices have called for suspension as well.

SF 189 is one of the bureaucratic nuts and bolts to implement the administration's drive for secret government. If enforced as written, the thrust of its program is to plumb leaks. If the program works, its ultimate impact will be to dry up the flow of significant information to Congress by outlawing it without prior review. That flow is the lifeblood of government accountability.

SF 189 not only requires employees to sacrifice their various statutory whistleblower protections. It cannot coexist with the free speech or due process requirements of the constitution. This attack on constitutional rights means that to reestablish effective whistleblower protection, Congress must restore to federal employees the full range of constitutional rights enjoyed by all other Americans but lost to civil servants since the Bush v. Lucas decision.

Why have two million employees signed away their rights? In many instances they were forced to. Although in theory any legal contract is entered into voluntarily, the April 28 Air Force regulations warn that mere "reluctance to sign an [SF 189] will be considered a lack of personal commitment to protect classified information." With that handicap it would be hard for any Air Force employee to survive a performance appraisal.

Through the ISOO, the administration has argued that SF 189 is legal because it implements Executive Order 12356, which the civil service law permits as a restriction on public whistleblowing disclosures. The rationalization cannot withstand scrutiny. The whistleblower law permits restrictions specifically identified in a statute or executive order. In 1978 our organization helped defeat an administration push to permit broader restrictions drawn from rules and regulations that implement congressional statutes. Congress rejected the administration's language, and free speech can only be specifically restricted by the text of an Executive Order or statute -- not from a derivative that interprets or implements the former. Sen. Rep. 95-969, at 21-2. SF 189 is at best a derivative of a derivative. It implements National Security

Decision Directive 84, which states in the opening paragraph that its terms are "in addition to" the requirements of EO 12356. In short, this contract cannot coexist with civil service law -- definitionally it represents precisely the type of gag Congress rejected.

Second, the ISOO has argued that a clause in EO 12356 protects the whistleblower provision, because the Executive Order forbids information from being classified to conceal misconduct. Unfortunately SF 189 establishes liability based on the contents of information, not the government's motive in any particular classification decision. Information that couldn't be classified to cover up a scandal arguably could be classified under various hypotheses for legitimate purposes. If the possibility exists, the would-be whistleblower could still face prosecution for disclosing national security breakdowns to Congress.

If there were any doubt about the gag order's illegality, it should be dispelled by a July 28, 1987 legal opinion from the Congressional Research Service's American Law Division. The opinion, which was prepared at Senator Grassley's request, is enclosed as Exhibit 4. The Division concluded,

> To be consistent with [civil service] whistleblowing protections it would appear that the secrecy agreement would have to permit without punishment or negative personnel action, the public disclosure of information which the employee believes evidences a violation of law, or waste, fraud or abuse, and which is not specifically classified information or specifically required to be kept secret under E.O. 12356 or other Executive Order, and must allow the disclosure of information evidencing such illegality, waste, fraud or abuse to the Special Counsel, an Inspector General, or to the Congress even if the information is classified or required to be kept secret.

(emphasis supplied). Exhibit 4, at 4-5.

Although the Division found the legal free speech boundaries to be clear, in effect it warned of the risks from accepting a flawed secrecy agreement and expecting the courts to "reform" it in practice: "However, cases and experience have shown that whistleblowing protections may be difficult to enforce in court on behalf of an employee." (citations omitted). Exhibit 4, at 7. We cannot count on the courts to solve this problem. Congress must attack the gag order directly.

In terms of effect, the American Law Division explained,

> In a practical sense, to the extent that the secrecy agreement because of its apparent breadth and vagueness of terms chills or discourages the disclosure of any information which evidences waste, fraud, corruption or illegality in government, that effect or result would be in contrast to and in derogation of the intended results of the whistleblowing statute.

(citations omitted). Exhibit 4, at 7. Unless SF 189 is rescinded, its terms may go beyond a "chilling effect." The text for even the "clarified" gag order has the potential to create a free speech Ice Age. It has no place in a free society, or in the merit system.

CIVIL SERVICE AGENCIES

If SF 189 is one of the nuts and bolts for secret government, the Office of the Special Counsel (OSC) has been the sledgehammer. Although created as the big brother for the merit system in general and whistleblowers in particular, since a 1981 staff purge the Office has deteriorated into a Big Brother in the Orwellian sense -- the administration's most effective weapon to identify wounded dissenters and finish off their careers, to the point of serving as a resource to blacklist rejected reprisal victims who came for help.

The most striking characteristic of the OSC has been its role in creating secret law. In practice, the OSC is a highly-political prosecutor's office that ferociously defends the secrecy of its operations. OSC investigations lead to secret reports that the agency will not even release to the victim who needs it for related litigation. The OSC accepts no obligation to talk with the witnesses offered by a whistleblower, or even with the whistleblower. When it does talk to witnesses the OSC seldom takes sworn public statements of testimony, but rather permits its investigators to write up their own versions of each witnesses' testimony -- versions which the witnesses generally do not see and frequently disagree with when they do. OSC public letters closing out cases almost never discuss the evidence from either side or the legal basis for conclusions. The bottom line is that the bases for OSC decisions, which have been against whistleblowers in over 99% of the cases, are unverifiable.

The OSC does not even recognize an obligation to explain to affected employees how the Office operates. When I inquired last summer about the agency's procedures for investigating a GAP whistleblower client's reprisal allegations, the OSC investigator replied that "it was none of [my] damn business" how the Office operated as it determined my client's rights. The OSC's approach to law is so arrogantly impersonal that its Prosecutive Division, which decides whether to litigate, almost never sees the human beings whose testimony provides the facts in the case. Contrary to the basic premise of law, the government factfinders who talk to the witnesses and examine their demeanor for honesty and reliability have no direct role in the OSC decision. When whistleblowers have inquired, OSC investigators repeatedly have asserted that they cannot make recommendations about who is right.

In short, seeking help at the OSC requires submitting to secret proceedings and a secret record, all in order to obtain a decision from faceless bureaucrats the victim never meets who refuse to disclose the facts or explain their reasons and will go to court rather than release the investigative file under the Freedom of Information Act. Whistleblowers risk their careers to fight secret betrayals of public trust. They deserve a better structure than this when they try to defend themselves.

Our organization and others had hopes that last summer's arrival of a new Special Counsel, Ms. Mary Weiseman, would restore a commitment to the Office's lawful mission. Ms. Weiseman has introduced two welcome improvements. First, she is personally courteous, a marked contrast from her predecessor. Second, the Office has filed complaints for a handful of federal employees out of the more than 1,000 who sought help over the last year.

Unfortunately, a few token oases will not solve the free speech Saharan desert in the executive branch. Even more disappointing, the new courtesy at the top belies reports of more antagonistic behavior against whistleblowers by OSC investigators and officials than at any time in recent years.

The alleged examples of OSC misconduct listed below are drawn from GAP intakes, clients and witnesses in OSC investigations. We believe that as long as these practices commonly occur, Congress should question Ms. Wieseman's definitions when she asserts that the system is working. She may be describing the exception rather than the rule. All of the reported instances below have come to GAP's attention since the March 10 House hearings this year. Frustrated complainants report that the OSC --

1) has failed to respond until from two to four months after complaints were filed.

2) failed to tell an employee that his telephone call summarizing the facts of his case and requesting assistance did not qualify as a complaint, which caused a year's delay in processing the charges.

3) accepted and then reversed positions on whether there was jurisdiction to help a part-time federal employee.

4) spoke with management officials to rebut written reprisal allegations challenging a proposed reassignment, while failing to interview the complainant or proferred witnesses. Subsequently, the agency changed the reassignment to a firing.

5) refused for four months before agreeing to interview the primary witness to rebut management attacks against a whistleblower whose case already is a year old and whose year old stay request the OSC has ignored.

6) failed to talk with a complainant until a telephone call when the OSC investigator said the case was without merit. Although the complainant attempted to present supporting facts, she was told that her version conflicted with what the agency said, that it appeared she was incompetent, and that she was risking an indictment.

7) orally told a complainant that the Office would not overrule the Merit Systems Protection Board, when the MSPB had already ruled unfavorably against the employee's appeal. The OSC representative would not put this statement in writing.

8) told a whistleblower to put all his facts in writing and then did not discuss his evidence in the OSC's written letter closing the case, after the employee responded with a 970 page report, including a 64 page chronological narrative and 161 exhibits.

9) after making a whistleblower wait nearly five years for an investigation and delegating critical factfinding interviews to the defendant agency in the reprisal charges, failing to ask the decisive questions of the key witness necessary to determine whether the whistleblower had been fired for just

cause, and then closed the investigation without pause when the employee pointed out the oversight.

10) consistently refusing to apply twelve years of First Amendment law that tests whistleblower firings on whether the agency would have taken the same action in the absence of protected dissent or exercise of appeal rights. Instead, the OSC in practice investigates only to learn whether the whistleblower could have been fired; whether he or she were vulnerable. Since everyone has some skeleton in the closet if the government snoops with sufficient zeal, this theory helps to explain why so much of the Special Counsel's resources go into investigating the whistleblower.

11) has been quoted in the Federal Times as asserting that First Amendment violations do not qualify as prohibited personnel practices, contrary to the language of 5 USC sections 2301(b)(2) and 2302(b)(11).

In most of the above instances, complainants were upset that the Special Counsel did not take their cases seriously. They may have been the lucky ones. The OSC's response to Mr. John Berter is a microcosm of the dangerous reality behind the Special Counsel's reasonable sounding rhetoric. The case is particularly significantt, because Ms. Weiseman has described it publicly as a "thorough and objective" ... "search for the truth. It's one of the most extended and intensive investigations we've ever done." In other words, the case represents the state of the art at the OSC, both for integrity and reliability.

Mr. Berter is one of four Veterans Administration (VA) officers who blew the whistle on alleged police brutality at the Cincinnati VA Medical Center (VAMC). Mr Berter and the others described uncivilized attacks on veterans who were patients or visitors to the hospital. The allegations included accounts of the VAMC police chief kicking and punching suspects; standing on a victim's groin until he admitted the chief was God; smashing a victim's face against the wall and then refusing to allow the blood to be cleaned; interfering with treatment by beating an elderly patient in the midst of intravenous injections; and similar abuses. After identifying the whistleblowers, the chief took steps to fire all four. The OSC has not helped any of them.

GAP conducted an extensive investigation before agreeing to represent Mr. Berter, and we have confirmed that his brutality and reprisal charges have extensive merit. To date GAP has obtained 23 affidavits from victims or supporting witnesses, and Mr. Berter passed a lie detector examination. Our investigation reveals that most of the violence was directed at minorities, and that the police chief repeatedly called his victims "nigger" as he beat them. Further, the chief has a history of similar incidents at a VA hospital in Texas.

For the first ten months after Mr. Berter filed a complaint the OSC did not share a similar interest in the facts. In March Mr. Berter testified at the House hearings to complain that the Special Counsel had not responded in a timely manner to his request for assistance. Although Mr. Berter sought help fairly early in the harassment, the OSC had waited to respond while he suffered through a "retraining program" that largely ignored his alleged job deficiencies while increasing his workload up to 400%; was denied leave to be with his wife during life-threatening pregnancy complications; was denied leave without pay when he sought time off from work on doctor's and therapist's orders to treat the effects of stress from the job; and twice received notices of termination. Only last September, after four months delay, did the OSC investigate for a weekend in Cincinnati.

The OSC subsequently denied Mr. Berter's request for a stay, and the agency finalized the termination. At the March hearings, House Civil Service Subcommittee members expressed dismay that the Special Counsel had not intervened. The OSC responded by assigning a team of investigators to the case.

At first GAP was excited that the Special Counsel was finally focusing on Mr. Berter's plight. He has been reduced to accepting substitute assignments to guard parking lots in order to make ends meet. Little did we realize, however, that we had severely threatened our client's rights by helping him to draw the OSC's attention. The OSC functionally adopted the perspective of counsel for the VA, and has investigated Mr. Berter while ignoring the legal elements to prove retaliation. While the investigation is ongoing, the OSC has engaged in unrestrained attacks to Congress and the press on Mr. Berter's motives, his allegations, his doctors, his polygraph, his supporters (whom the OSC also has investigated), the witnesses, the victims, his illness, and his skills.

The OSC has also ignored relevant legal standards, such as whether the agency would have fired Berter in the absence of dissent. Consistent with its routine, the OSC limited its inquiry to whether the agency could have acted against him. Indeed, when the agency lacked any supporting documentation for an unsatisfactory performance appraisal of Berter that was an eventual basis for termination, the OSC ignored the obvious inference of pretext. Instead, the Office attempted to create an agency defense where none existed by constructing a paper trail to demonstrate Berter's alleged incompetence.

Consistently the OSC's assertions about its investigation and its attacks on Berter have been exposed as bluffs. One witness whom the OSC claimed to have interviewed insisted to GAP that she had never heard of the Special Counsel. Numerous witnesses whom the OSC claims failed to support Mr. Berter have since submitted affidavits repudiating the OSC for misrepresenting their testimony.

The OSC claims that the types of brutality described by Mr. Berter are "physically impossible;" inferring they are fantasies. But GAP has received an affidavit from an officer who just completed police training school. The physical attacks alleged by Berter represent common martial arts techniques.

Recently we learned of the Special Counsel's latest approach to the investigation. According to a frustrated VA police officer/witness, several weeks ago an OSC investigator interviewed him in Chief Wilson's trailor, with the chief sitting on the other side of a thin wall, clearly audible to the witness and the OSC. When the officer pointed out that Wilson could hear everything that was said, the OSC investigator asked if that bothered him and reluctantly said he would ask the chief if there were anywhere elase available. (The hospital building itself had numerous empty meeting rooms.) The officer went ahead anyway, but became more nervous when the OSC investigator asked all the questions in an unusually loud tone of voice. The witness had still been hoping for a shred of discreetness by speaking quietly. The OSC investigator took only cursory notes and turned off the tape recorder early in the interview, so there is no reliable record. Nor has the OSC offered the witness any draft statements to review and sign from previous interviews. The officer now expects to be fired soon.

The Special Counsel has dismissed the alleged brutaliity victims by defaming them as criminals and drug addicts who have no credibility. However, some are decorated for their combat valor. The Special Counsel has refused to interview any of these victims, who consistently were troubled war veterans who sought help at the VA hospital and instead received beatings.

One example in particular illustrates the OSC's false charges against Mr. Berter. To demonstrate lack of whistleblowing reprisal, the OSC asserts that Mr. Berter has a history of being a problem employee and an incompetent writer, to the extent that his graduate professor cringed when trying to read Berter's reports. That's not what the graduate professor or Berter's previous supervisors say. The professor gave Mr. Berter a grade of "B" and rated his writing skills average compared to all graduate students he had taught at Xavier University.

GAP has checked with all of Mr. Berter's previous VA supervisors, and none recalled any particular problems with report-writing, the alleged performance inadequacy for which he was fired. Indeed, Berter's previous performance appraisals reveal repeated praise for his report writing. All of Berter's previous supervisors praised his demeanor, honesty and dedication as excellent. In the final performance appraisal before discovering Berter's whistleblowing. Even Chief Wilson, who later fired Berter, praised his report-writing and demeanor as an example for the other officers. A month before Mr. Berter started blowing the whistle, in a formal ceremony the VA hospital director presented him with a special commendation for his police work.

Unfortunately, if GAP had not retraced the Special Counsel's steps in this case, Mr. Berter could not have verified the basis for the OSC's negative conclusions by checking an available record of sworn testimony or documentary evidence. Documents providing a full analysis of 25 OSC deceptive techniques in the Berter case are enclosed as Exhibits 5A-C. Overall the inescapable conclusion is that every dollar the OSC has spent responding to Mr. Berter's charges has been a dollar spent to attack the merit system in general, and in particular the victims who sought help. At GAP we are particularly concerned with how many other John Berters have gone through the same ordeal. Few whistleblowers can afford to reconstruct an OSC hatchet job in order to rebut it. And they should not have to.

The Berter case and the list of complaints above should not distract from the dedicated efforts of individual OSC staffers. But these abuses represent the risks that whistleblowers already fighting reprisals shouldn't have to take in order to seek help. The abuses also teach a significant lesson. Offering a powerful mandate of authority without corresponding acccountability is an invitation for abuse of power. Even beyond obvious bias, the Office of the Special Counsel has exploited its lack of accountability through two techniques -- 1) advocating and relying on secret law; and 2) discarding due process in responding to federal employees defending their property right to their jobs.

The result has been a lawless Office that is as destructive to the merit system as the National Security Council was to foreign policy.

Unfortunately, even due process cannot compensate for determined bias in the administrative appeals process. There have been no significant positive trends among Merit Systems Protection Board decisions since the March hearings in the House. Mr. Berter's experience again illustrates on an anecdotal level the lack of viable legal options for whistleblowers. He was forced to drop his appeal after the Board's administrative judge refused to allow him to present evidence for the whistleblower defense to his dismissal; refused to permit testimony from the majority of his proferred witnesses, including certain victims and all the other whistleblowers; and explained that the only issue in the case was whether the agency could fire Mr. Berter on the stated charges. As Mr. Berter learned, due process in form without substance offers no positive value.

Appeals to the U.S. Court of Appeals for the Federal Circuit represent the next step in the legal road to nowhere for aggrieved civil servants. Last month the Federal Circuit remanded a case in favor of General Services Administration (GSA) Senior Executive Service (SES) official Bertrand Berube, in what appeared to be a rare victory for whistleblowers. A close reading of this comparative success, however, reveals the court's continuing disregard for congressional intent. Although anger at Berube's threats to exercise appeal rights was GSA Administrator Gerald Carmen's stated reason for the discharge, the court refused to consider the reelevance of protected appeal rights. So much for 5 USC 2302(b)(9). The court also effectively canceled statutory language forbidding agencies from firing SES employees on grounds of inadequate performance. On balance, the Office of the Special Counsel, the MSPB and the Federal Circuit have become a legal Catch 33 for whistleblowers. It is no wonder that the civil service has been silenced.

RECOMMENDATIONS

The Whistleblower Protection Act of 1987 takes significant steps to address some of the more significant abuses of the status quo. I have no doubt that if this legislation is passed more whistleblowers will prevail than under the current system, and fewer employees will be victimized by the Office of the Special Counsel. Unfortunately, as written the bill does not match the full extent of the merit system breakdown, nor the intensity of the administration's attack on constitutional rights wthin the executive branch. If requested, GAP will work with subcommittee staff on detailed proposals to implement the following recommendations for this bill to mature from an improvement to a solution.

1. Restore to federal employees the full range of statutory and constitutional rights and remedies relied on to protect the freedom of other American citizens, including the right to sue for constitutional torts or violation of statutory free speech rights in a jury trial of peers. Restoring these remedies will neutralize the current attack on federal employees'

constitutional rights. Further, it is unjust that civil servants must sacrifice this basic right in order to have a system of administrative remedies. Corporate employees, for example, do not sacrifice their right to jury trials for wrongful discharge suits merely because administrative remedies frequently exist. The House Civil Service Subcommittee already has added a nonpreclusion clause to protect statutory remedies such as in the Privacy Act, the Administrative Procedure Act, the False Claims Reform Act and the Federal Tort Claims Act, among others.

2. Foster a reasonable chance for civil service employees to successfully appeal job reprisals by establishing healthy competition for the MSPB. This could be accomplished by adopting the model for employment discrimination cases, in which complainants who do not receive a timely administrative decision can obtain de novo review of their case in U.S. District Court. These court precedents have had a significant impact on EEOC case law, even during its recent controversial years. In a less formal manner, competition could be created by permitting the option to arbitrate rather than appeal to the Board. This option has been preferable in the federal labor-management relations sector where it is currently available for challenges to violations of collective bargaining agreements.

3. Directly neutralize SF 189 by making it a prohibited personnel practice to discriminate against an employee for communicating with Congress. The law should be clear that this right is absolute. This initiative would provide enforceability for 5 USC 7211, which established the right but provides no remedy.

4. Complete the response to SF 189 by declaring null and void any contracts, agreements, rules, regulations or other executive branch attempts to violate 5 USC sections 2302, 7211 or any other statutory free speech protections.

5. Explicitly declare through statutory language that the definition of protected whistleblowing under 5 USC 2302(b)(8) is complete and absolute once the statutory conditions have been met. The White House initiative with SF 189 is not the only attempt to rewrite the whistleblower statute. The Federal Circuit has held that protected speech under section 2302(b)(8) is subject to arbitrary conditions such as being the first to expose a problem, and to fluctuating balancing tests of first amendment case law. It was precisely that uncertainty that Congress sought to eliminate by originally passing the whistleblower provision, but action is necessary to defend the boundaries of protected speech by clarifying its definition.

6. Strengthen the language of section 2302 to protect civil servants from any improper retaliation, instead of just specific listed personnel actions; and to cover all employees whom we expect to follow the merit system and the Code of Ethics for Government Employees. For example, civilian employees with military supervisors should not lose jurisdiction to challenge prohibited personnel practices, as occurred with Mr. Whitson when he sought OSC assistance.

7. Abolish the Office of the Special Counsel. Further funding is simply throwing good money after bad.

8. If the OSC is to continue as a mandatory part of the whistleblower's defense cycle, eliminate its litigative

functions. If the inherent pressures of prosecutorial discretion were gone, there would be less incentive to close cases and more to offer a balanced preliminary recommendation. This approach would adopt the Department of Labor (DOL) model for administrative decisions under the environmental whistleblower statutes. The OSC would then conform structurally to DOL's Wage and Hour Division, which has played a constructive investigatory role under those statutes.

9. If the Special Counsel's litigative functions are to remain, provide for judicial review to challenge arbitrary and capricious OSC conduct. Further, mandate the attorney-client relationship for all OSC interactions with complainants, while making clear that the OSC is not required to litigate in any given instance. The OSC should not be allowed to compromise the rights of complainants, or to seize control of files created for the whistleblower's case.

10. Give employees a realistic basis to believe their dissent can make a difference by strengthening the whistleblower disclosure channels. Currently the system fails due to conflict-of-interest from agency self-investigations. Even when the OSC orders an agency investigation after finding a substantial likelihood the whistleblower was correct, agencies almost never agree that serious charges were well-taken or act to correct the abuses. Further, contrary to statutory language the OSC asserts it cannot second-guess agency reports when evaluating them for reasonableness.

Legitimacy could be restored through permitting the whistleblower to qualify for factfinding under a nonbinding arbitration that would send recommended findings to the agency chief, as an alternative to agency self-investigations. Further, the whistleblower must be guaranteed rights to participate in the investigation and resolution of the dissent. Finally, the OSC must be required to strictly scrutinize final agency reports when evaluating them for reasonableness and completeness.

Mr. Chairman, whistleblowers are the living histories who keep our government honest. But just as Colonel North shredded documents to eliminate the truth, the current system has shredded the careers of these honest patriots and silenced the civil service system in the process. GAP pledges to work with this subcommittee until the silence is broken.
24806

Exhibit 1

TESTIMONY OF
THOMAS DEVINE, GOVERNMENT ACCOUNTABILITY PROJECT
Before the
CIVIL SERVICE SUBCOMMITTEE OF THE
HOUSE POST OFFICE AND CIVIL SERVICE COMMITTEE

on the

WHISTLEBLOWER PROTECTION ACT OF 1987

March 10, 1987

Madame Chairwoman and Committee members:

Thank you for inviting my testimony today. My name is Thomas Devine and I am the legal director of the Government Accountability Project (GAP), a non-partisan, non-profit legal support organization for government or corporate employees who challenge illegal, abusive, dangerous or wasteful misconduct where they work.

The Whistleblower Protection Act of 1987 is even more timely than last year's version of the bill. After the events of 1986, no reasonable person should deny there is a crisis in government accountability. The Challenger disaster highlighted the need for freedom of scientific dissent to effectively warn against reckless uses of technologies before the tragedies occur. The Iran-contra scandal highlighted the danger of secret policies conducted without public debate through a free flow of information to Congress. These and other disasters could have been prevented if freedom of speech for civil service employees existed in practice, instead of just on paper.

Madame Chair, over the last year the failure of the Civil Service Reform Act's whistleblower protections have reached a third level of seriousness. At your early hearings witnesses described how the Act had failed to achieve its stated purposes. By the administrations of Special Counsels Kozinski and O'Connor, witnesses testified how the Office of the Special Counsel had turned into a Trojan Horse that attacked the rights of those individuals who sought help. The last year has previewed the worst consequence of all, however. The Reform Act has solidified as a threat to the other preexisting, effective remedies available to federal employees in statute or under the constitution. Unless Congress acts decisively, employees will not only be deprived of a fighting chance under the Reform Act, but may be disqualified by its existence from successfully defending themselves in any other way.

In short, the stakes of the Special Counsel's performance are becoming more serious. As a result, we question why the Special Counsel has not welcomed your proposal, which would reduce the direct demands on OSC resources by providing reprisal victims with an alternative remedy and would make it easier for the OSC to win the cases it accepts. It is difficult to have confidence in any agency as the final legislative solution to reprisals, when the agency's leader does not want the tools to increase her odds of success. A more realistic framework to assess whether change is needed can be provided by answering four questions.

First, is there a need for stronger free speech protection in the civil service laws? As discussed above, the repeated Executive Branch breakdowns during 1987 speak for themselves. Columnists recently have criticized civil service employees for not following up and exposing the symptoms of illegal foreign policies in the Mideast and Central America. In another context, even OPM Director Constance Horner has criticized civil service employees for being too timid. In all fairness, what does she expect? When the civil service agencies consistently endorse even the crudest cases of reprisal, the better linguistic substitute for "timid" would be "realistic." Blame should not be directed at the two million conscientious federal workers, but at the ineffective system for dissent in which they have lost confidence.

By comparison, the federal civil service laws are falling further behind the pace of free speech developments. A majority of states have adopted "public policy exceptions" that permit corporate whistleblowers to sue for punitive damages when wrongfully discharged. Similarly, the Department of Labor administrative law system has developed a well- balanced body of reprisal case law to administer various environmental whistleblower statutes. Professional societies have adopted and seriously attempted to implement codes of ethics in increasing numbers. But the agencies responsible to enforce the civil service whistleblower protection laws remain functionally blind to the concept.

H.R. 25 offers several improvements to reinforce current law. The bill strongly emphasizes the congressional policy to favor effective whistleblower protection. Most significant, H.R. 25 makes it a prohibited personnel practice to retaliate against an employee for refusing to obey an illegal order. That will finally provide enforceability to the Code of Ethics for Government Employees.

Hopefully, the record started by today's hearing will answer the second question to assess the need for change: Is part of the problem that the Office of the Special Counsel still is abusing or refusing to exercise its discretion, contrary to statutory language and legislative intent?

Since Ms. Wieseman's arrival, the OSC track record has changed from nonaction to token activity. In response to inquiries, the OSC has told us that during her administration there have been three corrective action requests, one corrective action complaint, and one formal stay request. Two of the corrective action requests and the complaint concerned whistleblowing. There have been four disciplinary complaints, but three were for Hatch Act violations rather than prohibited personnel practices. The OSC reported 18 instances where the Office obtained informal corrective action through settlement efforts. While a discernable difference from the O'Connor years, the current levels of OSC litigation are still short of the 1979-80 period in which Mr. O'Connor analogized the Special Counsel's effectiveness to that of "Keystone Cops." Unless there is a significant increase in the pace of OSC litigation and settlements, the Office will continue to be a nonentity with little or no impact on improper federal personnel practices.

More significant is the OSC's routine approach to handling incoming cases. Many of those who are rejected by the Special Counsel or have pending OSC cases also seek help from GAP. To prepare for your hearing we surveyed intakes since last summer. I am dismayed to pass along employees' complaints about the following ten practices which help to explain the OSC's record of tokenism. More specifically, employees report that the OSC has still --

1. refused to investigate cases where the Special Counsel would have jurisdiction if the alleged facts proved accurate.

2. refused to contact proferred witnesses after opening an investigation.

3. declined to accept supporting documentation.

4. forwarded evidence from a complainant, whose case had been rejected for lack of jurisdiction, back to the employee's agency. The agency then proceeded to fire the employee.

5. has refused to get involved with cases until the agency formally acts, which removes the opportunity to prevent prohibited personnel practices by entering cases to investigate and establish a deterrent presence in the early stages of reprisal.

6. informed an attorney seeking to learn the groundrules for how the OSC would handle the client's reprisal allegations that it was "none of [his] damn business."

7. delegated the Special Counsel's investigative factfinding duty to the target agency for the reprisal allegations. Not only is this policy illegal, it is hopelessly counterproductive by introducing a conflict-of-interest. An analogous policy in civil law would be for plaintiff's attorneys to ask the potential defendant to gather the facts to decide whether the plaintiff should sue the defendant.

8. terminated a case in the middle of investigation, without informing the complainant of the reasons.

9. denied requested relief without any case specific information.

10. refused to share the evidence in closed case files with the unsuccessful complainants, who were trying to defend themselves through other forums.

To put these observations in perspective, it would be unfair to generalize these practices to all OSC employees. In my experience many have been thorough, professional and dedicated. Even if the incidents listed above were only anomolies, however, they illustrate how ineffective the OSC has been for many individuals who needed help but experienced only helplessness and frustration. Madame Chair, if this list evokes feelings of deja vu for you, it does for me as well. Except for welcome but cosmetic improvements, the track record for the 1987 OSC is analagous to recent years.

H.R. 25 will help to reverse, or at least neutralize, the

OSC's biases by creating a professional responsibility through specifying that the Special Counsel represents those employees whose cases it pursues. Although this requirement would not force the Special Counsel to accept any given case, it would prevent the OSC from disclaiming any accountability to the reprisal victims whose allegations were confirmed. The private bar has long maintained a professional relationship with new clients, many of whose cases are ultimately rejected for representation. The bill also strengthens employee due process rights during OSC investigations. Perhaps most significant, H.R. 25 also frees employees from the OSC monopoly on their rights by granting all alleged prohibited personnel practice victims the right to appeal for an administrative hearing.

Restoring accountability at the OSC is necessary but not sufficient to provide effective protection, as seen by the answer to the third question: Is the Merit Systems Protection Board still defying congressional intent by depriving whistleblowers of any realistic chance of success on appeal? Unfortunately, the Board has not yet reversed the anti-dissent policies of Chairman Ellingwood's term.

The appeal of GSA whistleblower and Senior Executive Service manager Bert Berube is revealing. This committee already is familiar with Mr. Berube's case: the previous Special Counsel described his efforts to take advantage of due process rights as "blackmail" and "extortion." Last year Mr. Berube continued his Kafkaesque journey through the civil service legal system. After filing his appeal brief in January 1985, Mr. Berube waited for 17 months, until May 1986, to receive a decision from the Board. So much for expedited review. Curiously, although Mr. Ellingwood had relinquished his chairmanship in February 1986, he signed the decision some four months later as the swing vote in a two-one majority upholding Berube's removal.

The decision became more curious. While dismissing all but the performance-based charges against Mr. Berube, the Board permitted GSA to terminate him anyway despite guarantees in the Reform Act that SES managers could only be demoted for performance deficiencies, not fired.

The Board also expanded the Supreme Court's longstanding Mt. Healthy decision in a manner that will routinely leave those who exercise any appeal rights worse off for having defended themselves. Mt. Healthy held that if the employee proves free speech retaliation is a significant factor in the challenged job action, the agency can still prevail by demonstrating that it would have done the same thing on legitimate, independent grounds. By contrast, in Berube the Board effectively shifted that standard to one in which the firing is upheld if the employer "could have" taken the action for other valid reasons.

Under the new "could have" test, employees who engage in whistleblowing or who exercise appeal rights will be inviting Big Brother to join their appeal process through investigative fishing expeditions. There are skeletons to find in anyone's closet if the government snoops with sufficient zeal. Since the "could have" standard does not require an employer in fact to have considered this information in the personnel action, there is an incentive to gather the basis after the fact. Under the Berube doctrine, employees who appeal and raise the whistleblower defense risk extensive investigations into their private lives. Formerly these same retaliatory probes could have been challenged through seeking injunctive relief. Currently, the Federal Circuit Court of Appeals is reviewing Mr. Berube's case.

H.R. 25 takes significant steps to neutralize the Board's hostility by rebalancing the legal scales. The bill would replace the current burden of proof with the far more realistic standard that relief should be granted whenever an employee demonstrates by substantial evidence that whistleblower reprisal was a significant factor in the challenged personnel action.

That leads to the final area of responsibility for development of civil service law, and the fourth question. Has the Federal Circuit established effective judicial review to counter irresponsible Board precedents? Even more sadly, the answer is no. If anything, on occasion the Federal Circuit has been more hostile to dissent than the MSPB. To illustrate, in last year's Fiorillo decision the Federal Circuit declared that the First Amendment and the Reform Act's whistleblower provisions provide identical protection. This reasoning neatly eliminated the congressional intent to establish absolute categories of protected activity -- disclosures of illegality and other specific types of misconduct so significant that the whistleblower's rights would not depend on the increasingly unfavorable First Amendment balancing test. The Fiorillo court continued by holding that to earn protected legal whistleblower status the employee must prove his or her "primary motivation

[is] the desire to inform the public on matters of public concern, and not personal vindictiveness." (emphasis in original). There is no "selfless motives" test in the Reform Act. The public who benefits from significant dissent is not affected by why the whistleblower told the truth. By imposing this burden the Federal Circuit has now required that an employee must both prove the agency's illegal motives, and his or her own pure intentions.

The Federal Circuit was still not content, however. The Court rejected as "stale" Mr. Fiorillo's disclosures of allegedly ongoing prison violations, because the same type problems had been previously exposed in the press. As a matter of sound policy, dissent against long term, uncorrected problems should merit enhanced legal protection. At the Federal Circuit it does not merit any. Unfortunately, this forum has a monopoly on all federal employee appeals.

We cannot expect improvements in Federal Circuit trends. President Reagan has just nominated Robert Mayer to be the first judge on the Federal Circuit with experience in federal personnel law. That will entitle him to unique stature and deference in this court with an appellate monopoly. Unfortunately, Mr. Mayer gained his experience as the Deputy Special Counsel who helped Special Counsel Alex Kozinski decimate the Office in 1981, to the point where you introduced legislation to abolish the OSC. Mr. Mayer was the attorney who pursued the unsuccessful attempt to fire Mr. Kozinski's predecessor Mary Eastwood. Mr. Mayer implemented the gag order against the OSC's public affairs director Laura Chin that convinced her to resign, since she could hardly do her job without talking to other OSC staffers.

Under current law, at the Federal Circuit the Kozinski-Mayer policies on how to succeed in silencing civil service employees will have a unique lifetime significance. Fortunately, H.R. 25 will give appellants the option to bypass the Federal Circuit by filing for appeal in the circuit where they reside.

SUGGESTIONS FOR MODIFICATIONS

As seen from the discussion above, H.R. 25 takes numerous significant steps to address the free speech crisis in the Executive branch. Unfortunately, without certain conceptual improvements, this bill will not be a solution to the problem. That is because the scope of the proposed reforms does not match the scope of the breakdown, particularly in the last year.

Below I have summarized briefly the three conceptual improvements that we at GAP believe are necessary to complete the job started so well in H.R. 25. In overview, GAP supports in principle the four criteria for reform suggested by the Committee Against Government Waste in its written testimony. CAGW proposed that any legislative solution include the following criteria -- 1) alternative dispute resolution such as arbitration to resolve the whistleblower's allegations; 2) immunity for the whistleblower against personnel actions while the charges are being investigated and resolved; 3) positive recognition for dissenters who are vindicated; and 4) accountability for those who retaliate. The suggestions below are consistent with the CAGW proposals.

1. Restore the rights of federal employees that have been lost due to passage of the Civil Service Reform Act. In last year's testimony I described how the Supreme Court in Bush v. Lucas created an unexpected side effect: it made federal employees second class citizens by declaring that the Reform Act's passage creates an exclusive administrative remedy depriving employees of the right to sue for damages when their constitutional rights are violated. This result was counterproductive to the Act's goals, because it left many whistleblowers with fewer rights than they possessed before the statute's passage. As Judge Skelly Wright of the U.S. Court of Appeals for the D.C. Circuit recently explained, "We cannot attribute to Congress an intent to put whistleblowers in a worse position than they were in prior to enactment of the CSRA." (emphasis in original).

Increasingly Judge Wright's view is the minority, however. While the D.C. Circuit has long been the major court preserving the right to sue for constitutional violations, currently the entire circuit is reviewing the issue en banc to resolve recent contradictory decisions. Indications are that the emerging conservative majority on the court may well remove federal employees' right to sue for constitutional torts.

Ironically, although this action would be contrary to congressional intent, it is being done in the name of Congress. As Judge Silberman reasoned in December, "[I]nvoking judicial power to impose Bivens [constitutional tort] litigation on the civil service seems disdainful of the legislative branch. I would therefore decline the invitation to second-guess Congress." With this attitude in the courts, the legislative branch cannot sidestep the issue. Doing nothing would be equivalent to endorsing the end of constitutional suits by federal employees. Indeed, passage of H.R. 25 likely would clinch the issue. Significant decisions such as this month's case awarding damages to Dr. Brothers will be a last hurrah for freedom of speech.

Since last December rights have been lost that are even more significant on a day to day level than constitutional suits. The current trend is to abolish alternate statutory remedies that are related to the Civil Service Reform Act, even though the other statutes may provide assistance unavailable under the Reform Act. The most serious new loss for federal employees is the Privacy Act. Two recent decisions have held that civil service employees cannot go to federal district court for Privacy Act violations, reasoning that the particular misuses of records at issue were related to personnel actions which could be challenged by the Special Counsel, or appealed to the Board and the Federal Circuit -- again described as Congress' exclusive system of remedies.

Since December, the D.C. Circuit has adopted this view in the Hubbard case. In Missouri a District Court adopted the same theory to reject the Privacy Act suit of William Tuesberg, in part on the theory that the Special Counsel already had acted on his behalf. As you will recall from Mr. Tuesberg's testimony last year, however, the Special Counsel told him just the opposite: they were not representing him and owed him no duty. The net result was that while both the OSC and the court agreed Mr. Tuesberg may have suffered illegal retaliation, from his perspective he lost. As the explained, the Special Counsel "settled" his complaint by institutionalizing the retaliation. The court then washed its hands of the case.

Madame Chair, if the effect of the Reform Act ultimately is to deprive federal employees access to the bread and butter statutes that have worked for decades, the Act's ultimate impact will be to devastate the rights of federal workers. The current trend in the courts predictably will become the majority view. The wave in judicial appointments of the last six years has been to favor nominees with a statist pespective who generally support the philosophy that "the king can do no wrong." At previous hearings I have described how 70% of rejected OSC complainants who contacted GAP won relief in other forums. Without congressional action, they may no longer have the chance to win elsewhere.

The rights I am advocating will benefit whistleblowing managers as well as their subordinates. There is a valid concern, however, against multiple liability for managers -- from employees in court and the OSC before the Board. In our opinion, the proper solution would be to abolish the Special Counsel's authority to file disciplinary complaints. Because of suspect motives for selecting prosecutions and OSC failure to follow the evidence to high administration officials, OSC prosecutions have provided negligible benefits to the public or the reprisal victims. Generally the OSC only uses this authority to pursue Hatch Act prosecutions against Democrats or unions. The Special

Counsel has been reversed by the courts for its few significant non-Hatch act prosecutions. Abolishing this function would give the Special Counsel more time to help reprisal victims.

Even more significant, it would give managers more rights against bad faith prosecutions. As the experience of Mr. Harvey indicates, bad faith OSC prosecutions can turn into heavy handed nightmares for the defendant manager. A good faith manager is far better off to have the Department of Justice represent him or her in a constitutional suit where the employee must finance the prosecution before a relatively objective court, compared to hiring his or her own lawyer to defend against a suit financed by the Treasury in the MSPB, which is so biased it waved through the OSC's Harvey prosecution prosecution later rejected in court for lacking a "scintilla of evidence." Unfortunately, instead of quickly disposing of the suit through summary judgment in court, Mr. Harvey had to endure the ordeal of heavy-handed litigation in the administrative process before he could get to court.

2. Restore accountability and balance to MSPB case law. The increased OSC accountability promised by H.R. 25 will only be as meaningful as the Merit Systems Protection Board permits. While the bill takes serious steps to restore balance to the Board's decisions, equally serious loopholes remain and should be addressed.

First, the statement of legislative purpose in the statute should clearly specify that the right to engage in protected speech under the whistleblower provision is absolute. The statutory language must describe the context for reliable protection, not mere eligibility for a case-by-case balancing test of the government's relative interest in efficiency compared to the public's right to know and the dissenter's right to dissent. It must be clear that "selfless motives" tests, requirements to be the "first" to challenge particular misconduct and other red herrings are just that.

Second, analogous to the anti-discrimination laws, if the MSPB has not issued a decision within 120 days as required by statute, the complainant should have the right to file for de novo review in federal district court. While the bill has a 60 day limit for the Board to act on OSC corrective action complaints, the courts consistently have held that corresponding time limits for MSPB administrative appeals are not enforceable. This would add some accountability for cases such as Mr. Berube's, where he was helpless to act while the Board sat on his appeal for 17 months.

It also would introduce some healthy competition from the district courts for MSPB case law on prohibited personnel practices. It is significant that EEO administrative law has been far more balanced even during the last six years than MSPB decisions. The difference is that MSPB decisions have been introduced in a vacuum, whereas EEO precedents frequently conform to parallel rulings where the courts have original jurisdication.

Third, we strongly agree with the American Federation of Government Employees that an employee who convinces the OSC to take his or her case should not have to endure protracted litigation before the Board. While it is currently a near-miracle for an employee to gain the Special Counsel's support, that only makes the employee eligible for the OSC to take the case to the Board for a full hearing. The effect is that the victim must win twice. Besides being pragmatically impossible -- at least it has not happened since the Act's passage over eight years ago -- this convoluted system obliterates the Reform Act's goal of informal, expedited relief through the Special Counsel. Since the courts have endorsed the "dual victory" requirement to obtain help through the OSC, Congress should clarify the statutory language to restore its original intent by limiting agency appeals of OSC corrective action complaints to written comments before the Board by all parties.

Finally, while H.R. 25 reduces the employee's burden-of-proof from preponderance of evidence to substantial evidence, it may be possible to lower the burdens as effectively through a key presumption. We propose the following statutory presumption for your consideration: "Upon a showing that a disclosure under 5 U.S.C. 2302(b)(8) was made in good faith, there shall arise a presumption that the deciding official knew or should have known of its existence and that it played a significant part in taking the contested personnel action."

For whistleblowers, our final suggestion for conceptual modifications may be the most important. Establish a credible channel to challenge government illegality, fraud, waste or abuse. As you know, the most frequently-stated reason why would-be whistleblowers decide not to get involved instead of pursuing the Code of Ethics is that they don't think anything will happen anyway if they speak out. Among federal employees there is an overwhelming rejection of legitimacy for agency and OSC dissent channels. The goal of the reform Act was to promote agency "self-cleaning," but federal employees believe the result for serious policy challenges typically has been to clean by sweeping the allegations under the rug -- along with the whistleblower.

This result is inevitable when the Reform Act relies on agencies to investigate themselves. Although for certain types of cases the agency Inspectors General have done excellent work, Reform Act disclosures to the Special Counsel generally raise issues where the employee already has tried and been rebuffed by the agency's internal affair unit. In those instances, OSC backing only serves to prolong the agency's control of a coverup.

Two approaches are necessary to restore accountability. The first is to permit whistleblowers to elect nonbinding arbitration for dissent in which an IG investigation would be inapprropriate. The arbitrator would issue recommended decisions to the agency chief, who then would prepare a corrective action report for the Special Counsel as under current law. To illustrate how the system would work, an employee challenging fraud more likely would seek an Inspector General investigation. An employee challenging illegal policies or reckless technological decisions could pursue arbitration.

The second suggested improvement is necessary whether or not arbitrations become an option to resolve dissent. Congress must specify that the Special Counsel has a duty of "strict scrutiny" to evaluate agency reports responding to whistleblower charges. Since Mr. Kozinski's administration, the Special Counsel has taken the position that Congress forbid it to engage in serious review of whether the agency responded in good faith. Therefore, the OSC consistently has accepted all agency reports that say virtually anything about the charges and are signed by even an acting agency chief. The bottom line has been that agencies have no incentive to admit mistakes. The self-investigations effectively have become vehicles for the agency to develop its denials at leisure against the whistleblower charges, and then to officially exonerate itself with subsequent OSC endorsement. By operating through the Reform Act instead of going to members of Congress or the press who may be genuinely interested, unwary whistleblowers have helped to perpetuate misconduct by postponing serious responses and giving the target agency a chance to perfect its defenses.

CONCLUSION

On its own, no statute can legislatively create free speech in the Executive branch. As we learned from the civil rights movement after Brown v. Board of Education, even with a legal victory it takes decades of struggle to secure those rights in practice. But some statutes, like the Voting Rights Act, are milestones in which Congress provides indispensible reinforcement. It is already clear that without any changes the Whistleblower Protection Act of 1987 will result in several important steps toward achieving its goals. But unless serious holes are filled, the problems will continue and your help soon will be needed again for further legislative solutions. No one wants that scenario. We at GAP pledge to work with your staff for as long as it takes to achieve our dream -- that this legislation becomes a free speech milestone for federal employees and the public they seek to serve.

25202

Information Security Oversight Office
Washington, DC 20405

Exhibit 2A

July 29, 1987

Dear Mr. Kennedy:

The Information Security Oversight Office has delivered to the *Federal Register* for immediate publication a revised rule that implements the Standard Form 189, "Classified Information Nondisclosure Agreement," and the SF 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)." We anticipate its publication by Monday or Tuesday, August 3 or 4. Because you have expressed an interest in the nondisclosure agreements and their implementing regulation, we enclose a copy of the rule as it was delivered to the *Federal Register*. For your reference we also enclose copies of the current editions of the SF 189 and the SF 189-A.

Sincerely,

Steven Garfinkel

Steven Garfinkel
Director

Mr. Joseph Kennedy
Staff Senior Attorney
Government Accountability Project
25 E Street, NW (Suite 700)
Washington, DC 20001

Enclosures

BILLING CODE 6820 KC

INFORMATION SECURITY OVERSIGHT OFFICE

32 CFR Part 2003

National Security Information;
Standard Forms

AGENCY: Information Security Oversight Office (ISOO).

ACTION: Final rule.

SUMMARY: This amendment to 32 CFR § 2003.20 provides (1) authority for the witnessing and acceptance of the Standard Form 189, "Classified Information Nondisclosure Agreement" or the Standard Form 189-A, "Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government)," by an authorized representative of a contractor, licensee, grantee, or other non-Government organization, acting as a designated agent of the United States; and (2) points of clarification concerning the meaning and intent of specific provisions of SF 189 and SF 189-A. The points of clarification do not alter the substance of the agreements reflected in SF 189 and SF 189-A. They are fully consistent with previous interpretations provided in response to individual inquiries and apply to the interpretation of those provisions in existing versions and future reprints of SF 189 and SF 189-A.

EFFECTIVE DATE: Upon Publication.

FOR FURTHER INFORMATION CONTACT:
Steven Garfinkel, Director, ISOO.
Telephone: (202) 535-7251.

SUPPLEMENTARY INFORMATION: This amendment to 32 CFR Part 2003 is issued pursuant to section 5.2(b)(7) of Executive Order 12356.

List of Subjects in 32 CFR Part 2003

Classified information, Executive orders, Information, National security information, Security information.

32 CFR Part 2003 is amended as follows:

PART 2003 -- NATIONAL SECURITY INFORMATION -- STANDARD FORMS

1. The authority citation for 32 CFR Part 2003 continues to read:

AUTHORITY: Sec. 5.2(b)(7) of E.O. 12356.

Subpart B - Prescribed Forms

2. Section 2003.20 is revised to read as follows:

§ 2003.20 Classified Information Nondisclosure Agreement: SF 189; Classified Information Nondisclosure Agreement (Industrial/Commercial/Non-Government): SF 189-A.

(a) SF 189 and SF 189-A are nondisclosure agreements between the United States and an individual. An individual is to execute either the SF 189 or the SF 189-A, as appropriate, before the United States Government may authorize that individual access to classified information.

(b) All employees of executive branch departments, and independent agencies or offices must sign SF 189 before being authorized access to classified information.

(c) All Government contractor, licensee, and grantee employees, or other non-Government personnel requiring access to classified information in the performance of their duties, must sign either SF 189 or SF 189-A before being authorized access to classified information.

(d) Agencies may require other persons, who are not included under paragraphs (b) or (c) of this section, to execute SF 189 or SF 189-A before receiving access to classified information.

(e) Only the National Security Council may grant an agency's request for a waiver from the use of SF 189 or SF 189-A. To apply for a waiver, an agency must submit its proposed alternative nondisclosure agreement to the Director of ISOO, along with a justification for its use. The Director of ISOO will request a determination about the alternative agreement's enforceability from the Department of Justice prior to making a recommendation to the National Security Council. An agency that has received a waiver from the use of SF 189 need not seek a waiver from the use of SF 189-A, if the employees of its contractors, licensees and grantees, and other non-Government personnel are required to sign a nondisclosure agreement identical or comparable to the agreement for which a waiver has been granted.

(f) Each agency must retain its executed copies of SF 189 and SF 189-A in file systems from which the agreements can be expeditiously retrieved in the event that the United States must seek their enforcement. The copies or legally enforceable facsimiles of them must be retained for 50 years following their date of execution. An agency may permit its contractors, licensees and grantees to retain the executed agreements of their employees during the time of employment. Upon the termination of employment, the contractor, licensee or grantee shall deliver the SF 189 or SF 189-A of that employee to the Government agency primarily responsible for his or her classified work.

(g) An authorized representative of a contractor, licensee, grantee, or other non-Government organization, acting as a designated agent of the United States, may witness the execution of SF 189 or SF 189-A by another non-Government employee, and may accept it on behalf of the United States. Also, an employee of a United States agency may witness the execution of SF 189 or SF 189-A by an employee, contractor, licensee or grantee of another United States agency, provided that an authorized United States Government official or, for non-Government employees only, a designated agent of the United States subsequently accepts by signature the SF 189 or SF 189-A on behalf of the United States.

(h) Points of clarification. As a result of inquiries concerning the meaning and intent of specific provisions of SF 189 and SF 189-A, the following points of clarification are provided. These points of clarification do not alter the substance of the agreements reflected in SF 189 and SF 189-A. They are fully consistent with previous interpretations provided in response to individual inquiries and apply to the interpretation of these provisions in existing versions and future reprints of SF 189 and SF 189-A.

(1) As used in paragraph 1 of SF 189, the term "classifiable information" refers to information that meets all the requirements for classification under Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security, but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information. A party to SF 189 would violate its nondisclosure provisions only if he or she disclosed without authorization classified information or information that he or she knew, or reasonably should have known, was classified, although it did not yet include required classification markings.

(2) As used in paragraph 3 of SF 189 and SF 189-A, the word "indirect" refers to any situation in which the knowing, willful or negligent action of a party to the agreement results in the unauthorized disclosure of classified information even though the party to the agreement does not directly communicate, deliver or transmit classified information to a person who is not authorized to receive it. A party to SF 189 would violate its nondisclosure provisions only if he or she knew, or reasonably should have known, that his or her action would result, or reasonably could result in the unauthorized disclosure of classified information.

(3) As used in paragraph 7 of SF 189, "information" refers to "classified information," exclusively. Future reprints of SF 189 will reflect this clarification explicitly.

(4) As used in the third sentence of paragraph 7 of SF 189 and SF 189-A, the words "all materials which have, or may have, come into my possession," refer to "all classified materials which have or may come into my possession," exclusively. Future reprints of SF 189 and SF 189-A will reflect these clarifications explicitly.

(5) The format for the "Witness and Acceptance" statement on future reprints of SF 189 will be the same as the "Witness and Acceptance" statement of SF 189-A, which is consistent with the provisions of paragraph (g), above.

(i) The national stock number for the SF 189 is 7540-01-161-1869. The national stock number for the SF 189-A is 7540-01-237-2597.

(Signed) Steven Garfinkel

Dated: July 29, 1987

Steven Garfinkel
Director, Information
Security Oversight Office

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

An Agreement Between ______________________________ and the United States
(Name - Printed or Typed)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of my being granted access to classified information. As used in this Agreement, classified information is information that is either classified or classifiable under the standards of Executive Order 12356, or under any other Executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security. I understand and accept that by being granted access to classified information, special confidence and trust shall be placed in me by the United States Government.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of classified information, including the procedures to be followed in ascertaining whether other persons to whom I contemplate disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or negligent handling of classified information by me could cause irreparable injury to the United States or could be used to advantage by a foreign nation. I hereby agree that I will never divulge such information unless I have officially verified that the recipient has been properly authorized by the United States Government to receive it or I have been given prior written notice of authorization from the United States Government Department or Agency (hereinafter Department or Agency) last granting me a security clearance that such disclosure is permitted. I further understand that I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised and am aware that any breach of this Agreement may result in the termination of any security clearances I hold; removal from any position of special confidence and trust requiring such clearances; and the termination of my employment or other relationships with the Departments or Agencies that granted my security clearance or clearances. In addition, I have been advised and am aware that any unauthorized disclosure of classified information by me may constitute a violation or violations of United States criminal laws, including the provisions of Sections 641, 793, 794, 798, and 952, Title 18, United States Code, the provisions of Section 783(b), Title 50, United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing in this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulted, will result or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement.

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement including, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agreement.

7. I understand that all information to which I may obtain access by signing this Agreement is now and will forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, interest, title, or claim whatsoever to such information. I agree that I shall return all materials which have, or may have, come into my possession or for which I am responsible because of such access, upon demand by an authorized representative of the United States Government or upon the conclusion of my employment or other relationship with the Department or Agency that last granted me a security clearance. If I do not return such materials upon request, I understand that this may be a violation of Section 793, Title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I understand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted access to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unenforceable, all other provisions of this Agreement shall remain in full force and effect.

10. I have read this Agreement carefully and my questions, if any, have been answered to my satisfaction. I acknowledge that the briefing officer has made available to me Sections 641, 793, 794, 798, and 952 of Title 18, United States Code, Section 783(b) of Title 50, United States Code, the Intelligence Identities Protection Act of 1982, and Executive Order 12356, so that I may read them at this time, if I so choose.

11. I make this Agreement without mental reservation or purpose of evasion.

SIGNATURE	**DATE**	**SOCIAL SECURITY NO.** *(See notice below)*
ORGANIZATION		

The execution of this Agreement was witnessed by the undersigned, who, on behalf of the United States Government, agreed to its terms and accepted it as a prior condition of authorizing access to classified information.

WITNESS AND ACCEPTANCE:

SIGNATURE	**DATE**
ORGANIZATION	

NOTICE: The Privacy Act, 5 U.S.C. 552a, requires that federal agencies inform individuals, at the time information is solicited from them, whether the disclosure is mandatory or voluntary, by what authority such information is solicited, and what uses will be made of the information. You are hereby advised that authority for soliciting your Social Security Account Number (SSN) is Executive Order 9397. Your SSN will be used to identify you precisely when it is necessary to 1) certify that you have access to the information indicated above or 2) determine that your access to the information indicated has terminated. Although disclosure of your SSN is not mandatory, your failure to do so may impede the processing of such certifications or determinations.

STANDARD FORM 189 (8-83)

OMB NO 3090

CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT
(INDUSTRIAL/COMMERCIAL/NON-GOVERNMENT)

AN AGREEMENT BETWEEN ______________________ AND THE UNITED STAT
(Name of Individual - Type or print)

1. Intending to be legally bound, I hereby accept the obligations contained in this Agreement in consideration of n being granted access to classified information. As used in this Agreement, classified information is information that classified under the standards of Executive Order 12356, or under any other Executive order or statute that prohib the unauthorized disclosure of information in the interest of national security. I understand and accept that by bei granted access to classified information, special confidence and trust shall be placed in me by the United States Gover ment.

2. I hereby acknowledge that I have received a security indoctrination concerning the nature and protection of clas fied information, including the procedures to be followed in ascertaining whether other persons to whom I contempla disclosing this information have been approved for access to it, and that I understand these procedures.

3. I have been advised and am aware that direct or indirect unauthorized disclosure, unauthorized retention, or neg gent handling of classified information by me could cause irreparable injury to the United States or could be used advantage by a foreign nation. I hereby agree that I will never divulge such information unless I have officially verifi that the recipient has been properly authorized by the United States Government to receive it or I have been given pri written notice of authorization from the United States Government Department or Agency (hereinafter Department Agency) responsible for the classification of the information that such disclosure is permitted. I further understand th I am obligated to comply with laws and regulations that prohibit the unauthorized disclosure of classified information.

4. I have been advised and am aware that any breach of this Agreement may result in the termination of any securit clearances I hold and removal from any position of special confidence and trust requiring such clearances. In addition, have been advised and am aware that any unauthorized disclosure of classified information by me may constitute a viol tion, or violations, of United States criminal laws, including the provisions of Sections 641, 793, 794, and 798, Title 1 United States Code, and the provisions of the Intelligence Identities Protection Act of 1982. I recognize that nothing this Agreement constitutes a waiver by the United States of the right to prosecute me for any statutory violation.

5. I hereby assign to the United States Government all royalties, remunerations, and emoluments that have resulte will result or may result from any disclosure, publication, or revelation not consistent with the terms of this Agreement

6. I understand that the United States Government may seek any remedy available to it to enforce this Agreement i cluding, but not limited to, application for a court order prohibiting disclosure of information in breach of this Agree ment.

7. I understand that all classified information to which I may obtain access by signing this Agreement is now and wi forever remain the property of the United States Government. I do not now, nor will I ever, possess any right, interes title, or claim whatsoever to such information. I agree that I shall return all materials which have, or may have, com into my possession or for which I am responsible because of such access, upon demand by an authorized representativ of the United States Government or upon the conclusion of my employment or other relationship that requires access t classified information. If I do not return such materials upon request, I understand that this may be a violation of Sec tion 793, Title 18, United States Code, a United States criminal law.

8. Unless and until I am released in writing by an authorized representative of the United States Government, I under stand that all conditions and obligations imposed upon me by this Agreement apply during the time I am granted acces to classified information, and at all times thereafter.

9. Each provision of this Agreement is severable. If a court should find any provision of this Agreement to be unen forceable, all other provisions of this Agreement shall remain in full force and effect.

(Continue on reverse)

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330-1000

OFFICE OF THE SECRETARY

14 July 1987

Exhibit 2B

MEMORANDUM FOR GENERAL WATTS

SUBJECT: SF Form 189

I have received your 2 July 1987 notification that I must sign SF Form 189 within 30 days or face loss of my security clearance. In conformance with your stated purpose in that communication, I wish to assure you of my awareness of the duties required of me by law as has been explained to me in the past, and confirm my commitment to protect classified information.

As you know, I have not refused to sign this form, but rather requested time to consult with counsel as to its legality and impact on my existing, established rights as a civil servant and United States citizen. Over the last two months, my attorneys have conducted extensive legal research that raises reasonable and extremely serious questions about SF 189 -- with respect to both its translation and its impact.

As you know, paragraph 10 of SF 189 states that "my questions, if any, have been answered to my satisfaction." In order to avoid incurring liability for perjury by signing SF 189, I must receive answers to the important questions which have been raised before I can truthfully sign the agreement.

1. Are the terms employed in SF 189 subject to redefinition after the facts?

2. Is the contract enforceable by its own terms or does it incorporate other provisions by reference? If so, please specify.

3. If the definition of "classifiable" is information which clearly falls within the realm of classified information but through administrative delay has not been so designated, why does not SF 189 state this?

4. Does the term "classifiable" include information not originally intended for classification that subsequently achieves that status, due to unforeseen developments? If not, who determines whether the information was intended for classification, and in any given case, how is the employee to know the status of official intentions for particular information?

5. Why is there a distinction between the form federal employees must sign (SF 189) and the form federal contractors must sign (SF 189-A)? In particular, why are contractors only held accountable for classified information, while federal employees are held accountable for "classifiable" information as well? In addition, explain why federal employees are responsible for "all information" obtained by signing SF 189 while contractors are only responsible for the "classified information" so obtained?

6. Since it is maintained that SF 189 merely duplicates existing law, what purpose does it serve? What are the laws it purports to duplicate and why are they not sufficient.

7. In paragraph 7 of SF 189 the government claims a property right in all information accessed by signing the agreement. On what legal basis does this claim rest? Does not this claim run counter to the Copyright Clause of Article 1 of the United States Constitution, the Copyright Acts of 1909 and 1976 and Supreme Court doctrine as first set out in Wheaton v. Peters, 33 U.S. 591 (1834)?

8. Please fully define the term "indirect unauthorized disclosure" as used in paragraph 3 of SF 189. For example, does this mean that a civil servant who discloses information to a cleared source, such as a member of Congress or properly cleared staff employees, is liable if the committee releases it to an unauthorized source?

9. Paragraph 7 of SF 189 holds a federal employee responsible for materials "which have, or may have," come into their possession. What does the term "may have" mean in this regard? Does it mean that in any given case the burden-of-proof is on an employee who "may have" possessed the information to prove that (A) he or she did not have possession, or (B) he or she did not make unauthorized disclosures?

10. What effect does SF 189 have on the whistleblower protection afforded federal employees under 5 USC 2302(b)(8) of the Civil Service Reform Act of 1987? If there are inconsistencies, for purposes of defining liability under SF 189, which provisions prevail -- those in SF 189 or contradictory provisions of 5 USC 2302(b)(8)?

11. What effect does SF 189 have on the rights of a federal employee under 5 USC 7211 to petition Congress, or a member thereof, or to furnish information to the same? If there are inconsistencies for purposes of defining liability under SF 189, which provisions prevail -- those in SF 189 or contradictory provisions in 5 USC 7211.

12. What effect does SF 189 have on the obligations of a federal employee under Public Law 96-303, the Code of Ethics for Government Service? If there are inconsistencies, for purposes of defining liability under SF 189, which provisions prevail -- those in SF 189 or contradictory provisions in Public Law 96-303?

13. What effect does SF 189 have on 5 USC 552(b)(1) of the Freedom of Information Act which allows for withholding of national security information only in the case of materials which have been properly classified? If there are inconsistencies, for purposes of defining liability under SF 189, which provisions prevail -- those in SF 189 or contradictory provisions in 5 USC 552(b)(1) of the Freedom of Information Act?

14. Until the issuance of DOD 5200.1-R/AFR 205-1 on April 28, 1987, the signing of SF 189 was carried out on a voluntary basis. What was the reason behind the shift to a mandatory requirement?

15. In the event the Administration officially revives the mandatory prepublication review requirement of paragraph 1(b) of NSDD 84, will this provision be incorporated by reference into the terms of SF 189?

16. What provision is made for a due process hearing and determination of an employee's challenge to the legality and constitutionality of SF 189?

17. Are your answers to the above questions incorporated as part of the agreement defining liability under SF 189 for me?

18. I am presently in the process of completing a new personnel security questionnaire. How will my present efforts to ensure my constitutional and statutory rights affect that process, specifically when viewed in the light of DOD 5200.1-R/AFR 205-1 which cautions that mere reluctance to sign SF 189 will be considered a lack of personal commitment to protect classified information?

Thank you for your assistance in this matter. Please provide your answers by Friday, July 24, 1987 so that I can make an informed decision about whether to sign SF 189 and truthfully answer that my questions have been answered as required by SF 189. If you extend the 30-day deadline for my signature, of course I agree to correspondingly extend the time to respond to this inquiry.

A. E. Fitzgerald

A. E. FITZGERALD
Management Systems Deputy

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D.C. 20330

OFFICE OF THE SECRETARY

30 JUL 1987

MEMORANDUM FOR MR. A. ERNEST FITZGERALD, MANAGEMENT SYSTEMS DEPUTY

SUBJECT: Your 14 July 1987 Memorandum

Attachment 1 responds to your questions regarding the SF 189. Although you have already been given a copy of DOD 5200.1-PH-1, I have also attached another copy for your review. Your indorsement to my memorandum dated 2 July 1987 is due 6 August 1987 accompanied by your properly executed SF 189 or confirmation of your intent not to execute the SF 189.

Claudius E Watts
CLAUDIUS E. WATTS III, Lt Gen, USAF
Comptroller of the Air Force

Attachments
1. Responses to Questions
2. DOD 5200.1-PH-1

#1 The language used in SF 189 is intended to reflect a good-faith agreement between the individual and the United States. An individual is bound by the terms of the Agreement as those terms are defined in statutes, executive orders, the SF 189, Information Security Oversight Office regulation (32 CFR §2003.20), and in the documentation accompanying the SF 189. In the case of DOD employees, the accompanying documentation is DOD 5200.1-PH-1, a copy of which has been provided to you. By signing the SF 189 you acknowledge your responsibility to comply with laws prohibiting the unauthorized disclosure of classified information as those laws currently exist and as they may be changed by future laws. Such changes, however, could only have prospective effect. They could not retroactively render something a criminal offense after it had already occurred.

#2 The Agreement is enforceable on its own terms. The Agreement also incorporates by reference various statutes (reprinted in DOD 5200.1-PH-1) that are enforceable on their own terms. Paragraphs 1, 3, 4, 7, and 10 of the Agreement refer to statutes which can be enforced on their own terms.

#3 The term "classifiable" refers to information that meets all the requirements for classification under executive order, but which, as a result of negligence, time constraints, error, lack of opportunity or oversight, has not been marked as classified information. The Information Security Oversight Office (ISOO) advises that this definition could have been included on the form; it was believed more efficient to define the terms, with examples, in explanatory material (e.g. DOD 5200.1-PH-1) rather than on the form itself. ISOO is issuing a clarification of "classifiable" in the Federal Register as an amendment to 32 CFR §2003.20, the regulation that implements the SF 189.

#4 Whether information in a document that is not currently marked classified is "classifiable" is determined by whether the information meets all the criteria for classified information under executive order. It is the substance of the information that controls whether the information is classifiable. An individual who signed the SF 189 would violate the nondisclosure provisions of the agreement only if he or she disclosed, without authorization, classified information, or information that he or she knew, or reasonably should have known, was classified, although the information did not yet include required classification markings.

#5 As a federal employee you are being asked to sign SF 189. You will not be asked to sign SF 189-A. The absence of the term "classifiable" on the SF 189-A will not affect the terms of your agreement with the United States. The first line of paragraph 7 of the SF 189 refers to "all information to which [you] may obtain access by signing this Agreement . . . ." Read in context this phrase clearly refers to all classified information and that is the intended meaning. If you want to place the word "classified" between the words "all" and "information" you may do so. This clarification will appear in 32 CFR §2003.20 and future reprints of SF 189 will refer explicitly to "all classified information."

#6 The President issued National Security Decision Directive Number 84 (NSDD-84) when it became clear that existing efforts were not very successful in preventing unauthorized disclosures of classified information. NSDD-84 requires that all persons with access to classified information sign a nondisclosure agreement as a condition of receiving access. The SF 189, Classified Information Nondisclosure Agreement, was developed to comply with NSDD-84. It provides one form that is being used by all Federal agencies to ensure that those who are granted access to classified information are fully aware of their duties under the law. It also establishes an enforceable contract commitment to protect classified information. The form lists the various National Security laws and ensures that the individual has had an opportunity to review them before signing the form. (The statutes are reprinted in DOD 5200.1-PH-1) It is hoped the form will improve the handling of classified information and protect against unauthorized disclosures.

#7 The legal basis for implementation of SF-189 is NSDD-84. The protection of national security information is a fundamental constitutional responsibility of the President. This responsibility derives from the President's powers as Chief Executive, Commander-in-Chief, and the principal instrument of United States foreign policy. Agreements to preserve the secrecy of classified information are an appropriate method for the President to discharge these constitutional responsibilities. United States v. Marchetti, 466 F.2nd 1309, 1315-16 (4th Cir.), cert. denied, 409 U.S. 1063 (1972); cf. Snepp v. United States, 444 U.S. at 509 n. 3 (1980) (agreement serves "compelling interest" of Government in safeguarding national security information). When you sign this form and subsequently receive classified information from the United States you do not thereby acquire a possessory interest or title to that information. Your use, possession, and disclosure of that information is limited by law and this Agreement. The protections afforded classified information under statute and executive order are not precluded by copyright laws.

#8 "Indirect" unauthorized disclosure refers to those situations in which the knowing, willful, or negligent action of a party to the agreement results in the unauthorized disclosure of classified information even though the party to the agreement does not directly communicate, deliver, or transmit classified information to a person not authorized to receive it. A party would violate this aspect of the SF 189 only if he or she knew, or reasonably should have known, that his or her action would result, or reasonably could result, in the unauthorized disclosure of classified information. This clarification of "indirect" will appear in the Federal Register as an amendment to 32 CFR §2003.20.

One example would be leaving classified information in a place where it is reasonable to believe that some person without a clearance or need-to-know will be able to gain knowledge of it and in fact that occurs. Another example would be referring a person without a clearance or need-to-know to a news article that speculates about a classified subject and informing that person, from knowledge gained through your own authorized access, that accurate classified information is contained in the article. In both instances the individual did not directly make an unauthorized disclosure but used indirect means to do so.

You have asked about a situation in which a person who signed the SF 189 discloses classified information to a second individual who is properly cleared and has a need-to-know. That initial recipient later, without the complicity of the person who signed the agreement, discloses it to a person without such a clearance or a need-to-know. The initial disclosure is not an indirect unauthorized disclosure.

#9 The phrase "may have come into my possession" refers to future possession of classified information. Better phrased it would read, "I agree that I shall return all materials which have or may come into my possession or for which I am responsible because of such access . . . ." You should, therefore, interpret the phrase "may have come" as pertaining to future possessions and not as affecting any burden-of-proof. If you wish to strike the word "have," you may do so. This clarification will appear in 32 CFR §2003.20 and will be reflected in future reprints of SF 189 and SF 189-A.

#10 The SF 189 does not conflict with the so-called "whistleblower" statutes. Neither the SF 189 nor the laws referenced in it prohibit the disclosure of information that is not classified. When a whistleblower's first report of a matter will involve disclosure of classified information, the whistleblower may still seek appropriate investigation by reporting the matter to a person who is authorized to receive the classified information.

A whistleblower who has signed the SF 189 can also engage in protected whistleblowing under the Inspector General Act of 1978 by making an investigative complaint to properly cleared individuals at the DoD Inspector General. 5 U.S.C. App. §§ 7 & 8.

In addition, Executive Order 12356 (E.O. 12356), Sec. 1.6(a) specifically prohibits classification "in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security." This provision was included in the Executive Order to help prevent the classification of information that would most likely be of concern to whistleblowers.

Each agency has designated officials to whom challenges to classification may be addressed or to whom a disclosure of classified information is authorized. For example, within the Department of Defense, employees are now required to challenge the classification of information that they believe is not properly classified. Special procedures have been established to expedite decisions on these challenges. DoD 5200.1-R / AFR 205-1, para. 2-103.

In fact, the "whistleblower" provisions in the Civil Service Reform Act of 1978 clearly provide for the protection of classified information and permit appropriate action to be taken against those who unlawfully disclose classified information. For example, 5 U.S.C. §§2302(b)(8), 1206(b)(1)(A), and 1206(b)(8), allow action to be taken against employees who unlawfully disclose information "specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." Executive Order 12356 requires that certain information be kept secret in the interest of national security. Paragraph 1 of SF 189 defines classified information as "information that is either classified or classifiable under the standards of

Executive Order 12356, or under any other executive order or statute that prohibits the unauthorized disclosure of information in the interest of national security."

#11 There is no effect and no inconsistency.

#12 There is no effect and no inconsistency.

#13 The Freedom of Information Act (FOIA) explicitly recognizes the propriety of protecting classified information. Neither Executive Order 12356 nor SF 189 is inconsistent with FOIA. FOIA permits the withholding of information that is properly classified. If, in the course of responding to a FOIA request, a Federal employee finds information that he/she knows or reasonably should know is classified but is not properly marked, that employee is obliged by Executive Order 12356 to bring that information to the attention of a classification authority so that a determination regarding classification can be made. If the information is then marked as classified, it cannot be released under FOIA. If it is not then marked, it may be releasable if it meets other FOIA criteria.

By its own terms, FOIA respects the needs of national security. The employee who also respects those needs and checks to ensure that he/she is not releasing information that will endanger national security does not violate FOIA. On the other hand, an employee who intentionally or negligently releases information he/she knows or should know is marked as classified or should be marked as classified may violate laws protecting national security and the terms of the SF 189.

#14 NSDD-84 requires that all persons having access to classified information sign a nondisclosure agreement as a condition of receiving access. The SF 189 was developed in 1983 to meet that requirement. The drafters of NSDD-84 believed that most DOD and State Department personnel with access to classified information had already signed nondisclosure agreements. As a result, the initial efforts to implement the SF 189 focused on new employees. When it became clear that most DOD and State Department employees had not signed any form of nondisclosure agreement, the agencies were instructed to implement programs to have all employees who have access to classified information sign the SF 189. The Department of Defense then directed the Air Force and the other services to have current employees execute the SF 189 as soon as possible. Many employees signed the Agreements before formal publication of the DOD and Air Force regulations implementing the requirement of NSDD-84.

#15 There is no way to know what national security policies this or any other administration might establish in the future. The SF 189 fulfills the requirements of NSDD-84, paragraph 1(a) for access to classified information. It is not intended to serve as the nondisclosure agreement for Sensitive Compartmented Information (SCI) required in paragraph 1(b). The language regarding prepublication review appears only in paragraph 1(b), in reference to the SCI nondisclosure agreement. Assuming the occurrence of the events described in your question, the SF 189 would not be affected.

#16 Signing the SF 189 is a voluntary act. Refusal to sign it will result in your being denied access to classified information. No citizen has a constitutional right of access to classified information nor does the SF 189 create an individual "right" of access. AFR 205-32 provides procedures that must be followed when the Air force is considering revocation of an individual's security clearance. The regulation makes no provision for an employee to challenge the legality or constitutionality of the SF 189 in a personal hearing.

#17 The answers contained in this memorandum represent a good-faith effort to explain the SF 189 so that you can make an informed decision about whether you can comply with the conditions of access to classified information. These answers are not incorporated as part of the Agreement, but they have been coordinated with the Information Security Oversight Office, which has primary responsibility for the form.

#18 You have until August 6, 1987 to decide whether you will sign the SF 189. If you properly execute and deliver it to the Comptroller of the Air Force on or before that date the executed SF 189 will be accepted as your personal commitment to protect classified information.

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Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

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CHAIR
NATIONAL ADVISORY CO

Exhibit 3

MEMORANDUM July 16, 1987

TO: Interested Parties

FROM: Allan Adler, Legislative Counsel

RE: SF 189, "Classified Information Nondisclosure Agreement"

The ACLU finds no inherent constitutional barrier to an Executive Order requirement that government employees and other individuals, as a condition of being granted access to classified information, must sign an agreement which (a) imposes an obligation not to disclose such information without authorization and (b) is legally-enforceable in a civil action for breach of contract.

This position, however, is premised upon the understanding that the nondisclosure obligation accepted by the individual who signs such an agreement does not require prepublication review, and will be breached only where that individual has obtained properly classified information by virtue of a clearance requiring the agreement and has knowingly, willfully or negligently disclosed such information to a person or persons not authorized to receive it.

SF 189, the "Classified Information Nondisclosure Agreement" required pursuant to National Security Decision Directive 84 in implementation of the safeguarding requirements of Executive Order 12356, is purported to be such a narrowly-crafted contractual instrument. However, some of the key provisions prescribing the nature and scope of the obligations and potential liability of an individual who signs it rely on terms that are vague and subject to overreaching ex post facto interpretations which would illegally and, we believe, unconstitutionally broaden the government's authority under this agreement to reach disclosures of unclassified information and other communications that are not prohibited by law.

The ACLU believes that these problems can be resolved administratively by rescission of SF 189 in its present form, and issuance of a new version of SF 189 including remedial changes in the contractual language.

Alternatively, if rescission and reissuance are not feasible, appropriate clarifications of the obligations and liability imposed by the agreement (perhaps incorporating the Q & A format developed by the Information Security Oversight Office, as included in the Defense Department's briefing pamphlet, DOD 5200.1-PH-1) should be made a formal addendum to SF 189 or issued by ISOO or the National Security Council as part of a revised directive or regulation implementing the agreement.

The ACLU, however, urges that legislative action to properly limit the scope of SF 189 should be undertaken if administrative solutions are not forthcoming.

* * * *

"Classifiable" Information

Aside from its unnecessarily menacing and legalistic tone, the principal problem with the present language of SF 189 is the use of the term "classifiable" in a manner implying that the nondisclosure obligations of the contract extend to information which qualifies for classification under the standards and criteria of Executive Order 12356 but has not in fact been classified pursuant to the procedures of that Order.

Literal reliance on this term, in effect, prohibits the individual from disclosing concededly *unclassified* information and makes a mockery of the legal framework of statutes and Executive Orders that distinguishes between "classified" and "unclassified" information in order to assure proper safeguards for the former which would be inappropriate as access and dissemination restrictions on the latter.

Federal caselaw upholding the constitutionality of nondisclosure agreements of this kind clearly establishes that "the First Amendment limits the extent to which the United States, contractually or otherwise, may impose secrecy requirements upon its employees..." *McGehee v. Casey*, 718 F.2d 1137, 1141 (D.C.Cir. 1983), *citing United States v. Marchetti*, 466 F.2d 1309, 1313 (4th Cir.), *cert.denied*, 409 U.S. 1063 (1972). Specifically, the court in *Marchetti* noted that it would "decline enforcement" of the secrecy agreement signed by a CIA employee when he left the agency "to the extent that it purports to prevent disclosure of unclassified information, for, to that extent, the oath would be in contravention of his First Amendment rights." 466 F.2d at 1317. *See also Snepp v. United States*, 444 U.S. 507, 521 n.11 (1980) (Stevens, J. dissenting) ("It is noteworthy that the Court does not disagree with the Fourth Circuit's view in Marchetti, reiterated in Snepp, that a CIA employee has a First Amendment right to publish unclassified information.")

Executive Order 12356, like its predecessors, provides specific standards and procedures for purposefully distinguishing between "classified" and "unclassified" information. For example, the Executive Order, at Sec. 1.3(b), makes it clear that information must be classified if "it is determined to concern one or more of the categories" listed in the Order and "an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security." Moreover, the Executive Order, at Sec. 1.5, requires specific "Identification and Markings" to be "shown on the face of all classified documents, or clearly associated with other forms of classified information in a manner appropriate to the medium involved..."

Congress, through the statutory mechanism of the Freedom of Information Act, 5 U.S.C. 552 (b)(1), permits withholding of national security information as a matter of law only when the information concerns matters that "are (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

In Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), cert. denied, 421 U.S. 992 (1975), a "sequel" to the Marchetti case, the FOIA requirement for protectible national security information to be "in fact properly classified" led the court to conclude that, in reviewing deletions made from published materials pursuant to a secrecy agreement, "the deletion items should be suppressed only if they are found both to be classified and classifiable under the Executive Order." Clearly, the court used the term "classifiable" to mean that the classified information in question "in fact" qualified for classification, on the basis of the two-step determination made by an original classification authority pursuant to the Executive Order.

SF 189 does not use the term "classifiable" as a qualification on "classified," the way it was used by the court in Colby; instead, it uses it to identify a separate category of nondisclosable information. An individual who agrees not to disclose "classifiable" information is thus expected, quite unreasonably, to perform the task of the original classification authorities under the Executive Order; that is, to determine whether the information is within one of the "Classification Categories" and whether its unauthorized disclosure "reasonably could be expected to cause damage to the national security" so as to qualify for classification.

The overwhelming majority of individuals who are cleared for access to classified information are not authorized to make original or even derivative classification determinations, as such authority is enumerated or delegated under Executive Order 12356. Moreover, it should be clear that basic fairness prohibits holding an individual responsible for disclosure of classified information that the individual could not reasonably have known to be classified. This is obviously the underlying purpose of the "Identification and Marking" requirements of Executive Order 12356, as well as the statutory qualification protecting national security information only when it is "in fact properly classified pursuant to such Executive Order."

If an individual is to be held responsible for recognizing and protecting "classifiable" information, the Government must bear a substantial burden of proof to demonstrate that the individual knew or reasonably should have known that the information would have been "in fact properly classified" but for the lack of an opportunity for proper marking according to the standards and procedures of the Executive Order. It cannot be enough that the information appears to fall within one or more of the "Classification Categories" listed in the Executive Order, since those categories clearly embrace a great deal of information which is not only "unclassified" but "unclassifiable" because it would not meet the standard of "damage to national security."

The Executive Order itself does not impose safeguarding obligations for "classifiable" information, aside from the "Exceptional Cases" at Sec. 1.2(e) where an employee, contractor, licensee, or grantee of an agency that does not have original classification authority "originates information believed by that person to require classification..." [emphasis added]. It is noteworthy that these "Exceptional Cases" do not include instances where information is obtained by the individual in the course of employment, and they impose an obligation only where the individual believes the information requires classification.

The Question & Answer materials developed by the Information Security Oversight Office to explain SF 189 acknowledge these problems (#4) in explaining that "classifiable" information "refers to information that meets the criteria for classification under Executive Order 12356, but which has not yet been properly marked because of time limitations, oversight or error." Consequently, the Q & A materials provide that "[a]n employee with authorized access to classified information would only be liable for disclosing 'classifiable' information when he or she reasonably should have known that the information met the tests for classification and should have been marked as such."

The Q & A explanation acknowledges that, with respect to an alleged disclosure of "classifiable" information, the Government bears the substantial burden of having to prove that the individual -- in the absence of appropriate markings --should have known from other facts and circumstances that (1) the information qualified for classification, and (2) the information would have been "in fact properly classified" but for time limitations, oversight or error. Such "time limitations, oversight or error" are an additional part of the Government's burden of proof and could not be presumed from the nature of the information and the absence of proper markings.

The example accompanying the Q & A explanation, concerning the status of notes taken by an employee at a classified briefing prior to an opportunity to review and mark them, illustrates the very narrow nature of the "time limitations" exception in which an individual could be held liable under an agreement not to disclose "classifiable" information. Since the employee knew that the entire briefing was classified, it can fairly be said that the employee reasonably should have known that the notes qualified for classification and were not "in fact properly classified" only because there had not yet been an opportunity for marking.

The Q & A does not provide illustrative examples of "oversight or error" resulting in information being "classifiable" rather than "classified," and it is not at all clear why an individual should be expected to determine or have knowledge of the sensitivity of the information in such circumstances, unless the "oversight or error" was that of the individual (i.e., having original classification authority) himself.

Unlike the "lack of opportunity" situation, which will require a factual showing of the individual's personal knowledge of a time-constrained sequence of events precluding an opportunity for proper marking, "oversight or error" may simply involve the non-occurrence of events; that is, it doesn't require a showing that "something happened" to prevent classification, it merely requires the assertion that, for any or no particular reason, "nothing happened" to achieve classification.

Again, it would be wholly unfair to expect that the individual should presume to make his or her own classification determination based exclusively on the nature of the information. Unless the Government can show the individual's personal knowledge of specific facts which should reasonably have informed the individual about the "oversight or error" but for which the information would have been "in fact properly classified," the individual should not be liable for disclosure of "classifiable" information in such circumstances.

Unfortunately, however, no explanation of any kind is provided in the express language of the agreement to define the term "classifiable" and the Government has refused to permit the Q & A and other explanatory briefing materials to be formally considered as a part of the agreement. Without such qualification, the Government could baldly assert the "classifiable" nature of almost any information and, consequently, the individual who signs such an agreement risks potential liability wholly unrelated to legitimate obligations to safeguard classified information.

The ACLU believes that the cited federal caselaw would require a judicial construction limiting the enforceability of SF 189 to information that is "in fact properly classified" or "classifiable" in the sense discussed above. There is no reason, however, to leave such limitations to chance in light of the various ways in which this problem could be more directly addressed.

"Indirect" Disclosure

Similarly, the express imposition of liability for "direct or indirect unauthorized disclosure" in SF 189 raises definitional problems that could and should be clarified. What is meant by an "indirect" unauthorized disclosure?

The ISOO Q & A (#17) provides "one example" in terms of telling an unauthorized individual "where he might obtain the information, for instance, that he should read the story on pages 30-33 of a particular magazine because it was entirely accurate."

However, this is clearly inadequate to give an individual fair notice of the kinds of conduct that could be considered a violation of his or her obligations. Moreover, it is not at all clear why this example should be considered valid, since the story in the magazine is in the public domain and the individual cannot, based on these facts, be said to have disclosed anything but the whereabouts of unclassified information in response to an unspecified factual question.

It is noteworthy that the "Sanctions" for unauthorized disclosure of classified information by officers and employees of the U.S. Government, and its contractors, licensees, and grantees under Executive Order 12356, at Sec. 5.4(b)(1), apply only if they "knowingly, willfully, or negligently disclose to unauthorized persons information properly classified under this Order or predecessor orders." Without such a limiting definition of culpable behavior, the term "indirect" disclosure in SF 189 could subject an individual who signs the agreement to liability for disclosures that occur without the individual's knowledge, intent or negligence and which therefore cannot fairly be viewed as a breach of the individual's obligations to safeguard classified information.

Disclosures of Classified Information to Congress

Finally, it is not clear whether the Government believes that an individual's disclosure of classified information to Congress is an "unauthorized disclosure" in violation of the agreement.

Again, as shown in the language of Sec. 5.4(b)(1) of Executive Order 12356, an "unauthorized disclosure" in the context of classified information refers to a disclosure made to a person or persons who have not been cleared to receive information at that level of classification. A disclosure is not "unauthorized" simply because the specific transaction has not been approved; otherwise, each and every disclosure of classified information -- including those between two persons holding appropriate security clearances -- would be considered "unauthorized" unless specifically approved.

While it may be argued that a different rule applies to SCI and other special access programs, a disclosure of classified information to a recipient "authorized" (i.e., cleared) to receive information at that level of classification is not an "unauthorized disclosure."

Members of Congress are, of course, cleared for access to all classified information by virtue of their positions. So long as the information is given directly to a Member of Congress, or is communicated to a Member of Congress or a Congressional committee or subcommittee through the custody of a Congressional staffperson who has an appropriate clearance for such classified information, the disclosure cannot be considered "unauthorized." See also Intelligence Oversight Act, 50 U.S.C. Sec.413(e); Civil Service Reform Act, 5 U.S.C. Sec. 2302(b)(8) and 7211; and other statutory authorities protecting communications of classified information to Congress by government employees and other persons.

The language of SF 189 can and should, in the ACLU's view, be substantially improved through rescission and redrafting; in any event, its terms require further clarification which should become binding interpretations for the application and enforcement of the obligations and liability it imposes.

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

Exhibit 4

July 28, 1987

TO : Honorable Charles Grassley
Attn: Kris Kolesnik

FROM : American Law Division

SUBJECT : Effect of Secrecy Agreements on Whistleblowing Protections

The following memorandum is submitted in response to your request, as discussed with Kris Kolesnik, for information on the possible effect of the required secrecy agreements, or "non-disclosure agreements" required of persons in the executive branch receiving security clearances, on the "whistleblowing" protections of federal law.

Many, but not all, civilian employees in the executive branch of the federal government are covered by the "whistleblowing" protections enacted in the 95th Congress as part of the Civil Service Reform Act of 1978, P.L. 95-454, 92 Stat. 1114. The statutory provisions work to protect an employee from "personnel actions" which are taken as "reprisals" for the employee's whistleblowing activities, that is, the disclosure by the employee of certain illegal, improper or wasteful governmental activities. See 5 U.S.C. §2302(b)(8).

The general intent of Congress in enacting the whistleblowing protection provisions of the Civil Service Reform Act was to encourage the disclosure of illegality, waste, and corruption in government by protecting those employees who "blow the whistle" on such activity, and in so protecting and encouraging such disclosures, ultimately to increase the efficiency and effectiveness of the federal service. As stated in the Senate Report on the whistleblowing and civil service reform legislation:

> Often the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistle blowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast Federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants. These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.
>
> S. Rpt. No. 969, 95th Cong.,
> 2d Sess. 8 (1978).

There are, as a general matter, two types of protected whistleblowing disclosures that may be made by covered employees: (1) public disclosure of non-secret information or information not prohibited by law or certain executive orders from disclosure, and (2) disclosures of any information to specified and particular officers or employees of the government. Whistleblowing disclosures that are made public must not contain information the disclosure of which is prohibited by law, or which is specifically required by an executive order to be kept secret in the interest of national defense or the conduct of foreign affairs, such as classified information. 5 U.S.C.

§2308(b)(8)(A). However, disclosures which are otherwise "protected" disclosures, may be made, regardless of statutory and executive order secrecy requirements, to the Special Counsel of the Merit System Protection Board, or to an Inspector General of an agency or "another employee designated by the head of an agency to receive such disclosures." 5 U.S.C. §2308(b)(8)(B). The statute further expressly provides that the whistleblowing provisions are "not to be construed to authorize . . . the taking of any personnel action against an employee who discloses information to the Congress." 5 U.S.C. §1202(b). The Congress sought to protect its right to receive even "confidential" information from federal employees, without the employee's fear of reprisals:

> The provision is intended to make clear that by placing limitations on the kinds of information any employee may publicly disclose without suffering reprisal, there is no intent to limit the information an employee may provide to Congress or to authorize reprisal against an employee for providing information to Congress. For example, 18 U.S.C. 1905 prohibits public disclosure of information involving trade secrets. That statute does not apply to transmittal of such information by an agency to Congress. Section 2302(b)(8) of this act would not protect an employee against reprisal for public disclosure of such statutorily protected information, but it is not to be inferred that an employee is similarly unprotected if such disclosure is made to the appropriate unit of the Congress. Neither title I nor any other provision of the act should be construed as limiting in any way the rights of employees to communicate with or testify before Congress.
>
> H.R. Rpt. No. 1717 (Conference Report), 95th Cong., 2d Sess. 132 (1978).

Public disclosures that are prohibited by law, and so not protected by the whistleblowing statutes, are intended by Congress to be those that are prohibited by statutory law, or by executive order for national security reasons, and not those that are merely prohibited by regulation. An agency could not properly retaliate against an employee for the disclosure of protected whistleblowing information merely because the disclosure violated agency regulations. As noted in the Conference Report on the whistleblowing legislation: "The reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations." H.R. Rpt. No. 1717, supra at 130.

The non-disclosure or secrecy agreement in question, SF 189, requires as a condition to the access to classified information that the employee agree, among other things, never to divulge "classified information," which is defined to mean "information that is either classified or classifiable under the standards of Executive Order 12356, or under any other Executive Order or statute . . . ." The restrictions in the secrecy agreement on the disclosure of information which is not specifically classified under the Executive Order, but merely "classifiable," raise questions as to the consistency of the agreement with the whistleblowing protections of federal law and the purposes of the whistleblowing statute.

To be consistent with the whistleblowing protections it would appear that the secrecy agreement would have to permit without punishment or negative personnel action, the public disclosure of information which the employee believes evidences a violation of law, or waste, fraud or abuse, and which is not specifically classified information or specifically required to be kept secret under E.O. 12356 or other Executive Order, and must allow the disclosure of information evidencing such illegality, waste, fraud or abuse to the Special Counsel, an Inspector General, or to the Congress even if the information is classified or required to be kept secret. It is not clear whether or not the secrecy agreement on its face would subject an employee to loss of security clearance for any such disclosures.

The secrecy agreement would allow revocation of one's security clearance for the disclosure of not only "classified" information, but also for "classifiable" information. The non-disclosure or secrecy agreement does not precisely state what information would come within the term "classifiable," a term whose scope is apparently a matter of some conjecture at this time. It should be noted that the Executive Order referenced in the agreement, E.O. 12356, provides, at Section 1.3, that:

> (a) Information shall be considered for classification if it concerns:
>
> (1) military plans, weapons, or operations;
> (2) the vulnerabilities or capabilities of systems, installations, projects, or plans relating to the national security;
> (3) foreign government information;
> (4) intelligence activities (including special activities), or intelligence sources or methods;
> (5) foreign relations or foreign activities of the United States;
> (6) scientific, technological, or economic matters relating to the national security;
> (7) United States Government programs for safeguarding nuclear materials or facilities;
> (8) cryptology;
> (9) a confidential source; or
> (10) other categories of information that are related to the national security and that require protection against unauthorized disclosure as determined by the President or by agency heads or other officials who have been delegated original classification authority by the President. Any determination made

> under this subsection shall be reported promptly to the Director of the Information Security Oversight Office.
>
> (b) Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

Thus a broad range of information relating to weapons, weapon systems, the problems or vulnerabilities of such systems, foreign relations, etc., might conceivably be that type of information which could arguably be considered "classifiable" or "considered for classification" under the Executive Order, even if not classified at the time. Under the "classifiable" standard, it is arguably possible that the secrecy agreement may go beyond the Executive Order and actually punish the disclosure of information which is not at that time classified or required to be kept secret under the Executive Order, but could be in the future, and thus punish someone for an after-the-fact classification. Even information which has been de-classified is subject to possible re-classification at a later date, E.O. 12356, Section 1.6(c) and (d), and could thus presumably be called "classifiable," and subject one to penalties for disclosure under the secrecy agreement. To the extent that the secrecy agreement subjects to discipline the disclosure of information that is not in fact required to be kept secret under the Executive Order, it is arguably in conflict with the language and intent of the whistleblowing law, which would seem to provide that such disclosures are "protected." 5 U.S.C. §2308(b)(8)(A).

It should be noted that the Executive Order states that when there is a reasonable doubt about the need to classify information, one should protect that information as if it were classified "pending a determination" by an authority within 30 days. Section 1.1(c). The Executive Order may thus in this specific instance require information to be kept secret, pending a determination, even when the information is not yet classified, and thus the public disclosure of that information would not appear to be "protected" under the specific language of the whistleblowing statute.

In a practical sense and as a general matter, to the extent that the secrecy agreement because of its apparent breadth and vagueness of terms chills or discourages the disclosure of any information which evidences waste, fraud, corruption or illegality in government, that effect or result would be in contrast to and in derogation of the intended results of the whistleblowing statute. See S. Rpt. No. 969, _supra_ at 7-8.

In a legal context it may be argued that the whistleblowing law should protect an employee from a negative personnel action such as loss of one's security clearance for the public disclosure of information that is not classified or required to be kept secret at the time of disclosure by the Executive Order. 5 U.S.C. §2308(b)(8)(A). If such information is required to be kept secret only by the non-disclosure agreement, and not specifically by the Executive Order or a statute, it should, arguably, still be a "protected" disclosure. See H.R. Rpt. No. 1717, Conference Report, _supra_ at 130.

However, cases and experience have shown that whistleblowing protections may be difficult to enforce in court on behalf of an employee. See, for example, _Hearings_, H. Comm. on Post Office and Civil Service, "Whistleblower

Protection Act of 1986," Serial No. 99-54, 99th Cong., 2d Session (1986). The burden of proof of determining a "retaliation" for a protected disclosure is on the employee, In re Frazier, 1 MSPB 159 (1979), aff'd Frazier v. MSPB, 672 F.2d 150, 164-65 (D.C. Cir. 1983); Hagmeyer v. Department of Treasury, 757 F.2d 1281, 1284 (Fed. Cir. 1985), and where no direct evidence or statements exist may be difficult of proof. In "disciplinary action" cases against officers who allegedly retaliated against employees for protected whistleblowing disclosures, which are intended to provide significant deterrence to such retaliatory actions, the courts have required a showing of a wrongful "retaliatory intent" on the part of the acting official, and have required a determination of the official's "state of mind" to "insure that the motive for the adverse action was an improper one," that is, primarily to punish the employee or deter him from making protected disclosures. Starrett v. Special Counsel, 792 F.2d 1246, 1253-1255 (4th Cir. 1986); see also Harvey v. M.S.P.B., 802 F.2d 537 (D.C. Cir. 1986). In these cases where there is an independent, and arguably, legitimate management objective, other than primarily punishment or deterrence for whistleblowing, in taking or not taking an action regarding an employee, then the court might not uphold a disciplinary action against such official taking those personnel actions even when based in part on the disclosures made. Starrett, supra at 1254; Harvey, supra at 547-548. It is possible that a court may find that a breach of a non-disclosure or secrecy agreement by an employee provides such an independent and valid or "legitimate" management reason for taking a personnel action under such an analysis. But see Warren v. Department of Army, 804 F.2d 654, 658 (Fed. Cir. 1986), concerning an employee appeal of an adverse action - "Chapter 77 appeal" - where it was found that the "independent" grounds "considered in the proceeding [must] not include the 'protected disclosures' themselves."

Jack H. Maskell

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Legislative Attorney

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May 18, 1987

Mr. William Reukauf
Associate Special Counsel for Prosecution
Office of the Special Counsel
U.S. Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20005

Exhibit 5A

Dear Bill:

Thank you for your April, 29, 1987 letter, which I interpreted as a good faith effort to clear the air about the Office of the Special Counsel's (OSC's) investigation of Mr. John Berter's prohibited personnel practice complaint. In that light, it may be helpful to reiterate the five personnel actions, each of which independently represents prohibited personnel practices: 1) a March 1986 unsatisfactory performance appraisal; 2) subsequent inadequate, irrelevant performance counseling, retraining, and improvement programs that were administered in a retaliatory manner; 3) denial of requested leave without pay (LWOP); 4) denial of requested reassignments; and 5) termination of Mr. Berter. Unfortunately, the Government Accountability Project's (GAP's) concerns about the OSC's handling of the case have multiplied since my April 1 letter and legal memorandum, to which you were responding.

Initially, I appreciate that you will consider our legal analysis as you apply the facts with respect to the charge that Mr. Berter was Absent Without Leave (AWOL). Based on remarks by OSC representatives, a recent interview with Mr. Berter and GAP, however, we have even greater concern that your office is not investigating the facts necessary to apply longstanding First Amendment and civil service law. As you know, the Supreme Court's ruling in the 1974 Mt. Healthy decision and the Merit Systems Protection Board's (MSPB's) 1981 Gerlach decision established that even if an agency could have taken a personnel action such as termination, the firing is illegal if the motives were retaliatory. That is, the agency must prove that it would have acted to fire the vulnerable employee in the absence of protected whistleblowing dissent. I was extremely disappointed that your investigators failed to recognize this cornerstone of free speech law and repeatedly insisted that the only issue is whether the agency's charges against Mr. Berter were well taken. Unless there is a significant shift in emphasis, the OSC will not have investigated to learn the critical facts necessary to carry out your mandate -- enforcing the legal shields against prohibited retaliation.

You noted that the OSC is talking to witnesses supportive of Mr. Berter's reprisal allegations. We stand corrected. In making this statement, GAP was relying on representations of OSC investigators to GAP attorney Thomas Carpenter in March, when they declined to interview any of the reprisal witnesses referred by GAP on grounds that it was unnecessary. We are pleased that the OSC apparently reconsidered, at least with respect to some of the witnesses on civil service issues. However, our followup verification calls leave lingering doubts on this issue.. For instance, we checked and learned that one key witness whom the OSC told us was interviewed has never heard of your office, let alone talked with your investigators.

We are even more concerned, however, about the nature of OSC's interviews and the aftermath. The newly-interviewed witnesses unanimously reported that the OSC did not provide statements for them to review for inaccuracies and sign. This means that the position of these individuals will be characterized as whatever OSC investigators claim that the witnesses testified. The witnesses are upset that OSC investigators have misrepresented their point of view. It is essential that all sides have confidence in the integrity of the record prepared by your staff. Will you take steps to insure that premise by obtaining sworn statements from all witnesses?

In your April 29 letter you also reiterated that the Special Counsel is not interviewing victims, because that would duplicate the FBI's efforts. I find this response disingenuous. OSC's prosecution theory rests on a far broader law than the statute under which the FBI acted. There are many more questions to ask of victims, in order to carry out the OSC's mandate. Otherwise the whole case would duplicate the FBI, with respect to prosecution issues. Besides, the FBI talked to the same civil service witnesses whose interviews your office is duplicating.

Further, the OSC already is duplicating the FBI effort through reenactments of the beatings, designed to prove that whistleblowing officers' charges are physically impossible. We are extremely disappointed that beyond affidavits, the factual basis for the reenactments and negative conclusions has been restricted to interviews with the officers. Why not ask the victims what happened, and confirm with them whether their alleged pain, gouges, bruises, inability to breathe while the Chief's hands were on their necks, and other injuries were "physically impossible"?

Finally, there have been numerous beatings since the 1985 incidents investigated by the FBI, including alleged brutality in 1987. Perhaps the OSC would find it easier to reconstruct these more recent beatings, for which memories may be fresher.

Bill, we are most concerned with the OSC's premature, negative conclusions to Congress and the press about the facts in this case. In light of the gaping loopholes in your investigation, we were appalled that the OSC was quoted making unqualified, disparaging statements about the facts in Mr. Berter's complaint to a report from the Jack Anderson column. We are confused that congressional offices heard negative OSC factual conclusions that your staff tells us were never stated.

In this view, we are similarly disturbed with the following, as expressed at the recent OSC interview of Mr. Berter --

- creating a paper record to support the agency's unsatisfactory performance appraisal of Mr. Berter for report writing, when the agency itself had no records to support the appraisal. Is it the Special Counsel's function to engage us in an elaborate project to create an after-the-fact agency record when none existed at the time of the appraisal?

- inability to tell Mr. Berter whether the other officers with similar report writing records received unsatisfactory performance appraisals, or any expressions of management dissatisfaction. This, of course, is essential to determine discriminatory treatment.

- inability to assess whether the alleged errors were due to mistakes by Mr. Berter or other VA employees who provided inaccurate data, at the same time your office is making conclusions about his competence based on the assumption that he was the employee who personally erred.

- obvious disinterest in factors such as whether Mr. Berter's remedial training was irrelevant to his alleged performance problems; whether among other harassment his workload was increased up to 400% during the period he had to demonstrate improved report-writing; or similar points.

These loopholes would not be so significant if Mr. Berter's case were not a year old, if you were not publicly repudiating his allegations of prohibited personnel practices, and if your staff were not privately telling Mr. Berter that the agency's performance-based charges appear to have merit. Until your office recognizes the relevant legal precedents and gathers the necessary facts to apply the law, the Special Counsel is in no position to responsibly side with the Veterans Administration unless you view your role as advocate for the agency.

That is precisely the role that Mr. Berter and GAP believe the Special Counsel has assumed -- counsel for the VA. After events of the last few weeks we have lost confidence that there is any significant chance the OSC will adopt a neutral, objective perspective on this case. While we hope that our pessimism is mistaken, we are deeply discouraged on that point.

So that there will be no question of unfairness, your April 29 letter and this response will be placed in all future GAP briefing packets to Congress, veterans groups, civil rights organizations, and the media.

Sincerely,

Thomas Devine

Thomas Devine
Counsel for Mr. Berter

TD/jl

(129b01)

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

1120 Vermont Avenue, N.W. Suite 1100
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April 29, 1987

Thomas Devine, Esquire
Government Accountability Project
1555 Connecticut Avenue, NW
Suite 202
Washington, D.C. 20005

Dear Tom:

This is in response to your letter of April 1, 1987. You wrote as a follow-up to our meeting concerning the case of Mr. John Berter, and attached a memorandum of law prepared by your law clerk on the issue of AWOL. Please be assured that we will take your legal arguments under advisement in our consideration of the facts in this case and the conclusions to be drawn from those facts.

An additional matter has come to my attention which should be addressed at this time. By your memorandum of April 8, 1987, to "Concerned Citizens and Organizations," you have reinforced the misimpression that OSC has avoided talking to witnesses and victims associated with this investigation. Specifically, you have asserted that OSC has not spoken to Charles Wallace, Harold Hipple and "nearly all of the victims that GAP has developed statements on." You also criticized OSC for relying on evidence obtained during the FBI investigation in this matter.

As you may now be aware, OSC has interviewed, among many others, Messrs. Wallace and Hipple, and has vigorously examined numerous investigative leads in this matter. Therefore, I trust that you will not repeat these erroneous charges.

Whereas OSC was not previously in a position to actively investigate this issue for fear of jeopardizing the Department of Justice's then ongoing inquiry, since early March when that inquiry ended, we have committed a sizeable portion of office resources to this task and have also secured a copy of the FBI's investigative file. To the extent that the FBI provided us with pertinent information obtained from certain alleged victims, OSC at this time sees no basis to duplicate the FBI's efforts. As you are well aware, we will review evidence submitted by you or other individuals interested in this matter.

Sincerely,

William E Reukauf
William E. Reukauf
Associate Special Counsel
for Prosecution

WER/gdj

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MEMORANDUM

Exhibit 5B

TO: Congressional Contacts
FROM: Tom Carpenter and Tom Devine
RE: Rebuttal to False Charges Made by the OSC
DATE: June 18, 1987

The Government Accountability Project (GAP), represents Mr. John Berter, a former federal police officer at the Veterans Administration Medical Center (VAMC), where he was fired after blowing the whistle on alleged police brutality by the VAMC police chief Dan Wilson. GAP has learned of a renewed disinformation campaign by the Office of The Special Counsel (OSC) against our client. In response we have prepared a point-by-point rebuttal of the OSC attack on Berter in order to set the record straight.

1. One of the two charges in Chief Wilson's case against John Berter was the claim that Berter's writing, specifically report writing, was consistently unacceptable. As part of its investigation, the OSC interviewed one of Berter's graduate school professors, Dr. Michael Endres. The OSC has reported that Endres "cringed" whenever he had to read a Berter report. We spoke to Dr. Endres on June 3, 1987 and heard a completely different story.

Dr. Endres told us that when the OSC interviewed him, the bulk of the questions were aimed to discover his opinion of Berter's character and credibility. Endres gave Berter a strong, positive appraisal, stating that he was particularly mature, well adjusted, extremely honest, and generally a man of the highest integrity. Endres maintained that the subject of Berter's character was definitely the focus of the interview.

The OSC representatives did ask about Berter's academic abilities. Endres explained that although Berter was not the brightest student he had ever worked with, he compensated by being extremely hard-working, diligent, and dependable. He was a very involved student and one who really put his heart into his courses. John received "B" grades in the classes that Endres taught him. Although Endres gave him a very strong overall academic appraisal, he did mention that Berter's writing ability could use some improvement. According to Endres, he further stated that he considered Berter's writing average relative to some 300 other graduate students he had taught. In other words, the OSC blatantly misquoted Endres to misrepresent his assessment of Berter's competance as a report writer.

Endres emphasized that he "bitterly resented being misrepresented by the OSC" and that he was willing to put all of his statements in writing.

2. The OSC has stated that Berter never confided in anyone about his concerns until long after the alleged brutality, "not even his wife." The Endres interview also belies this assertion. Endres reported that the OSC seemed interested in whether or not Berter had ever spoken to him about the incidents of brutality, abuse, and misconduct he witnessed at the VA medical facility. Endres told the OSC that Berter had discussed the situation with him on at least two occasions, and that Berter was very concerned about the problems there. Endres further told one investigator that besides confiding in himself, Berter had also spoken about the situation to Paul Hahn, the Director of the Graduate Program. In short, contrary to OSC statements, the Office knew that Berter had talked to at least two people, Endres and Hahn, about the situation at the VAMC before he went public with the allegations.

3. The OSC contends that Berter kept changing his story, or embellished upon it. We have yet to hear from the OSC a reasonable account of this unfounded accusation. However, in our own discussions with OSC investigators, they have not provided any examples other than Mr. Berter switching from accusing the Chief from kicking a victims "balls" to kicking the victim's penis. According to the OSC, since the victim had his pants on during the beating Berter couldn't have pinpointed which portions of the sex organs were kicked. At any rate, the discrepancy is so trivial that it rebuts the OSC's accusations.

4. The OSC has tried to discredit John Berter's polygraph test, which indicated he was telling the truth. We have looked into this matter and found evidences of highly suspicious activity by the OSC.

Tom Carpenter of GAP spoke to Mr. John San Felice, the polygrapher who administered the test to Berter. San Felice reported that the OSC had questioned him about the test results, and that he, at the request of the OSC had turned the graphs over to Mr. Rick Arther, the founder of the Polygraph school that San Felice attended, for further analysis. San Felice maintains that Arther told him the graphs did indicate that Berter was telling the truth. Further, Mr. Arther has confirmed that conclusion in writing to the OSC. Strangely, however, when Tom Carpenter contacted Mr. Arther by phone on June 12, Arther refused to comment on the test results.

Not only did he refuse to comment, but he claimed that he couldn't talk because he had to protect his client's best interests. Carpenter asked if San Felice was his client, and Arther responded "No, the government is my client." When Carpenter asked if he meant the OSC, Arther refused to answer. Arther added that he had said too much already, and terminated the conversation. When we told San Felice of Arther's suspicious silence, he was as puzzled as we were. He told us, however, that the OSC had paid Arther to read the polygraph, and perhaps the parties had made some sort of agreement. We can only speculate as to what that agreement entails.

5. The OSC claims that the professionals who ordered John Berter to stay away from his job at the VAMC were not legitimate or credible because the medical doctor, Jack Gniwesch, had no experience in psychology, and the psychotherapist, Dr. Ida Katz had a doctorate in social work, not psychology. These excuses reveal a depressing level of ignorance.

Basic research reveals that it is perfectly acceptable in the profession for someone who has a degree in social work to practice psychotherapy. In fact, twice as many social workers practice psychotherapy as psychologists. Dr. Katz has the following credentials: a Master's degree in social work, a PhD in Psychology, a Member of NASW, member of the Academy of Certified Social Workers, Licensed Certified Social Worker, and Licensed Certified Psychotherapist. She is more than qualified to practice psychotherapy, and is licensed in several states. She has an office in Maryland as well as in Cincinnati.

Dr. Katz and Dr. Jack Gniwesch together direct a clinic known as the Consultation Center. Dr. Katz was the Clinical Social Work Practitioner and Social Work Director for the clinic, and Dr. Gniwesch was the Medical Director. Gniwesch is a doctor fully qualified to treat the physical ailments associated with stress and related disorders. His credentials and experience in the field stand without reproof. Although in isolation they may not be qualified to provide the full range of medical services, as a team they were highly qualified and successful.

GAP spoke with Dr. Elleen Cytryn, a practicing psychotherapist in Silver Spring, Md., who had practiced with Katz and known her for almost 20 years. Dr. Cytryn praised Katz as "one of the great people in the field." She further stated that both Katz and Gniwesch were highly qualified and well respected.

The most significant insight here about the investigation may be the OSC's narrow perspective the issue, however. Both Drs. Gniwesch and Katz complained strongly that the OSC investigators showed little or no interest in Mr. Berter's medical condition when the Office questioned each. Their nearly exclusive interest was in challenging these professional's qualifications.

6. The OSC is now arguing that the FBI investigation should be disregarded. This is a curious and highly significant shift in position. Knowing that we do not have access to the report, and thus do not know its contents, the OSC and the VA repeatedly have bludgeoned Berter's case by pointing to the Justice Department's decision not to prosecute. Secondly, in response to repeated GAP requests for the Office to interview the victims and several key witnesses, the OSC stated that it was relying on the FBI report

for that information. Now it turns out that the FBI supported prosecution, and the OSC is turning on the FBI report, contending that it was a poor job.

7. The OSC has charged that Berter is making these disclosures in order to get on TV and in the newspaper. That is patently absurd. Berter and the other whistleblowers first attempted to get attention to the abuses they observed through an anonymous letter. When that did not work, they attempted a confidential disclosure to the FBI. Berter stands to gain nothing from his disclosures, except peace of mind and the knowledge that his integrity is intact. Even if the OSC charge were true, that is irrelevant to the truth or falsity of the charges--ostensibly the OSC's mission to determine.

8. The OSC claimed the union president who worked on Berter's behalf, Lonnie Carter, was always a problem to the medical center and therefore could not be considered believable. This logic is preposterous. As the Union President, however, Mr. Carter's job is to hear complaints and grievances filed by union members against the VAMC. It is Carter's responsibility to see that the VA is treating its employees fairly and within the prescribed limits of the contractual arrangements. Nowhere in Carter's job description does it say that he must have an amicable relationship with the VA. Decisively, the "problems" he caused have not been actionable misconduct. Carter has been gainfully employed at the Cincinnati VAMC for over twenty years, longer than most employees there. He is in a unique position to know about the workings of the Center, since he represents all of the organized work force there. It is not the OSC's option to ignore relevant evidence because the source has caused "problems" for management. Indeed, that is what whistleblowers are supposed to do when management fails to operate within the law.

9. The OSC stated that the Berter's case would never succeed in court because all of the victims were either felons, drug addicts, or mental patients. These statements represent OSC defamation about individuals whom the OSC has refused to interview.

--Robert Shives is a decorated Vietnam war veteran who, since his honorable discharge from the military, has been employed as police officer, graphic designer, auto mechanic, sheet metal specialist, and has served in the Army Reserves. Presently, he is gainfully employed and performs supervisory duties with an organization called People Working Cooperatively (PWC). PWC is a non-profit organization that provides free repair service for elderly or in digent persons' homes. Shives was beaten by Chief Wilson and three other officers when he visited the VAMC to receive allergy shots.

--Robin Petrwoski was employed at the Dallas VAMC as a security officer when Chief Wilson was a detective at that facility back in 1984. She was the victim of sexual harassment as well as completely unorthodox and highly stressful training techniques by Wilson.

--Broderick Lattimer was a minister employed by the Dallas VAMC in 1984. He was severely beaten and racially slandered by Wilson and three officers because of an alleged traffic violation.

--Charles Engram has been employed as an assistant cook at the Cincinnati VAMC since 1982. Engram was arrested and falsely accused of stealing. No charges were brought up on the accusation. During and following the arrest, Engram was abused physically and verbally. He remains very intimidated by Wilson and some of the officers involved.

Some of the other victims do have criminal records, some are being treated for drug rehabilitation, and some are mental patients. Indeed, that is why many of these veterans were at the hospital; they need help. Unfortunately, they received beatings. At any rate, the status of the victims has no bearing on the fact that the witnesses to almost all of the incidents are credible, and do not fall into the categories of drug addicts, felons, or mental patients.

This rebuttal is not an all-inclusive list of grievances against the OSC on the Berter case. It should be read in connection with GAP's May 18, 1987 letter to Mr. Reukauf of the OSC. Further we are obtaining significant additional evidence of misconduct by the Office and of misrepresentations by its investigators. The ultimate lesson from this case is becoming increasingly clear however, that least in this instance, each dollar spent by the OSC has been a dollar spent to attack the merit system in general and in particular the rights of the victim who sought help. Based on this case study, the OSC's existence is counterproductive to the merit system. Agencies have enough built-in handicaps against whistleblowers. Federal managers don't need the multimillion dollar hatchetman known as the Office of the Special Counel. Whistleblower protection goals would be well-served by its abolishment.

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October 1, 1987

The Honorable David Pryor
Chairman, Subcommittee on Federal Service,
Post Office and Civil Service
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Senator Pryor:

Thank you for requesting the views of the Government Accountability Project (GAP) for supplemental questions on S. 508, the Whistleblower Protection Act of 1987. Because the debate largely concerns contradictory accounts of how the Office of the Special Counsel (OSC) responds to reprisal complaints by federal employees, we surveyed a sample of those who contacted both the OSC and GAP for assistance in the ten months before Ms. Mary Weiseman took office as Special Counsel -- the same time frame covered by her July 31 testimony. The survey questions and results from 15 complainants are enclosed as Exhibit 1. The survey sample represents slightly less than ten percent of the 176 whistleblower complaints that Ms. Weiseman testified the OSC received during that period. This submission also rebuts eight false and/or misleading statements in her testimony.

In overview, GAP was impressed with much of the rhetoric in Ms. Wieseman's testimony. Unfortunately, as seen from the survey results, her assertions of OSC policy do not yet reflect reality. If she succeeds in consistently implementing the philosophy she described, Ms. Wieseman will solve many of the current problems at her agency. That in no way would lessen the need for fundamental change. Indeed, Ms. Wieseman missed the point when she complained that it is unfair to criticize her for the faults of her predecessors. From a policy perspective the job is to assess the effectiveness of the statute, not the good faith of any individual Special Counsel. The case for the Whistleblower Protection Act rests on lessons learned from the abuses of previous Special Counsels. Ultimately, those lessons prove two significant principles: 1) The whims of a bureaucratic champion are no substitute for enforceable rights. 2) Mandates of totally discretionary authority without corresponding accountability are an invitation for abuse of power.

Even accepting Ms. Wieseman's testimony at face value, obviously the statute is not working. Out of 176 whistleblower complaints, Ms. Wieseman claims to have sought and obtained help for 6. In other words, over 94% were turned away without receiving any help. Those are the statistics of failure, not success.

RESPONSES TO SPECIFIC QUESTIONS

1. Have you encountered problems with the OSC's use of informal actions? Are they always successful from the point of the whistleblower?

There have been severe problems with the OSC's use of informal actions to impose settlements. On occasion they have been unsuccessful to the point of being conterproductive. Conceptually there are three flaws: 1) The complainant has no right to initiate the settlement negotiations. Just as with pursuing litigation, the decision to attempt settlement of a prohibited personnel practice complaint is totally left to the discretion of the Special Counsel. 2) The complainant has no rights with respect to the terms of settlement. The OSC recognizes no duty to pursue the interests of the reprisal victim, while negotiating or before approving a settlement. 3) The complainant has no rights if the agency breaches the OSC-agency informal agreement. As with initiating, negotiating and approving settlements, the Special Counsel has absolute discretion.

The experiences of frustrated federal employees illustrate each of these complaints. For example, in the GAP survey 13 out of 15 responded that the Special Counsel had not attempted to settle their cases. None reported that the OSC initiated negotiations.(Exhibit 1, at #21)*

The Special Counsel agreed that whistleblower William Tuesberg was victimized by a prohibited personnel practice, and then proceeded to negotiate and approve a settlement so unfavorable that Mr. Tuesberg later testified the agreement was a further reprisal against him. See Aplin and Devine, "Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection," 4 Antioch Law Journal 5, 41 (1986), enclosed as Exhibit 2.* When Mr. Tuesberg's attorney complained, the Special Counsel replied in effect that the settlement terms were none of Tuesberg's business, because it wasn't Tuesberg's case. As Special Counsel William O'Connor testified about a settlement, "We settled our case. His case is something else." (Id., at 41, n.220)(citation omitted)(emphasis added).

Mr. Vince Laubach's inability to challenge a breached informal agreement illustrates the third inherent flaw. The Special Counsel informed him that OSC had negotiated an informal stay of his removal, so it would be unnecessary to petition the Board. When the agency reneged, however, the Special Counsel did not act to enforce the agreement. Mr. Laubach was legally helpless in the situation. Id., at 46.

2. The OSC's testimony states that only two whistleblowers over the past eight years have "prevailed on the merits" in another forum. Do you agree with that statement?

---

* All exhibits may be found in the files of the Subcommittee.

The statement is so far from accurate that it suggests the OSC is prejudiced against whistleblowers. Initially, the Special Counsel's statement does not properly frame the issue. The question is whether the OSC has been as effective as possible in seeking relief for meritorious whistleblower claims. Often the best way to achieve that goal does not include victory on the merits. For example, after the OSC rejected whistleblower Vince Laubach's case he negotiated a grievance settlement that provided reinstatement, full back pay and $24,000 in compensatory damages. Id., at 40.

To directly rebut the OSC's assertion, there are at least 17 instances of which GAP is aware where whistleblowers won on the merits. Ms. Mary Macanaw, who testified in the Senate hearings, won a jury verdict. Mr. Eduardo Delgado, a United States Department of Agriculture inspector who was suspended, won on the merits after filing an EEO complaint. The OSC had rejected Mr. Delgado's prohibited personnel practice complaint. Id., at 44.

Two cases are reported Merit Systems Protection Board (MSPB) decisions involving complainants whose whistleblower reprisal claims were dismissed by the Special Counsel. Anderson v. Department of Agriculture, 82 F.M.S.R. 5043 (1982); Spadaro v. Dept. of Interior, Office of Surface Mining, 18 M.S.P.R. 462, 83 F.M.S.R. 5426 (1983). In two other instances, whistlebloweers who did not seek OSC relief won on the merits in MSPB decisions. Plaskett v. D.H.H.S., 82 F.M.S.R. 5095 (1982); Sowers v. Dept. of Agriculture, 24 M.S.P.R. 492 (1984).

Finally, since 1980 in unfair labor practice arbitrations employees prevailed 11 out of 15 times under the whistleblower defense when the arbitrator found jurisdiction. An analysis of those statistics is enclosed as Exhibit 3. In short, GAP agrees that the deck is stacked against whistleblowers who seek relief through litigation. But the private bar has achieved success through that approach at least 17 times more than the Special Counsel, which has yet to win a whistleblower corrective action hearing after nearly nine years and over $30 million in appropriations.

3. You suggest an arbitration route as an option to the MSPB. At what point would the arbitration option be available? Would the employee have to exhaust his administrative appeals first?

The arbitration option should be available when the retaliatory personnel action is proposed. Under this approach, the arbitration itself would be the administrative remedy, substituting both for intragency appeals before a proposed personnel action becomes final, and for the MSPB appeal. The employee should be required to attempt settlement or informal resolution before invoking arbitration.

4. One of your suggestions is to make the OSC purely an investigative entity. How would the case proceed from that point if the OSC did not have prosecutorial power?

This suggestion is based on the theory that even a good faith Special Counsel will be reluctant to rule favorably on behalf of all whistleblowers who deserve support, because the OSC can't afford to follow through and seek help with its limited budget.

The model for this role is the Wage and Hour Division of the Department of Labor, which conducts the preliminary investigations on complaints filed under the environmental whistleblower statutes. Wage and Hour investigators first attempt to conciliate after a complaint is filed, and then conduct 30 day investigations. At the conclusion of the investigation Wage and Hour issues a ruling and order for relief, if the whistleblower wins. At that point its role is finished. If either side is dissatisfied, there is the right to a de novo hearing before an Administrative Law Judge. See, e.g., 42 USC 5851.

The Wage and Hour Division generally has conducted highly professional investigations. An informal review of Department of Labor precedents indicates that Wage and Hour rules in favor of the whistleblower at roughly a 25% rate. From personal experience, I know that Wage and Hour investigators uniformly have made good faith efforts to settle the complaints. This model could be superior to the current OSC structure, with certain modifications:

1. The investigation should occur when an allegedly improper personnel action is proposed, and the agency should be barred from implementing the personnel action during the OSC investigation.

2. If the Special Counsel rules in favor of the complainant, the agency should be stayed from implementing the personnel action during any ensuing appeals. See Brock v. Roadway Express, Inc., _ U.S. _, (slip op.,issued April 22, 1987).

3. The right to a full hearing should depend on the consent of both parties. Otherwise, either side should be able to appeal the Special Counsel's decision to the full Board, through briefs and affidavits for a decision within 120 days. The entire process could be appealed to the circuit court of appeals in which the complainant lives, or to the Federal Circuit.

This approach would relieve the OSC of litigation duties which may create pressures to screen out worthy cases. It also would provide accountability through Board and judicial review for whistleblowers who feel the Special Counsel was serving as "counsel for the agency," instead of as an objective third party. Most significant, this would restore the OSC to its originally-intended role as an informal mechanism to secure streamlined relief -- an inexpensive alternative for employees who cannot afford the cost of more formal litigation.

Of course, the OSC also can litigate by filing disciplinary complaints. Currently, however, the Special Counsel's efforts in that area have been negligible. Ms. Wieseman testified that the OSC only had filed "two or three" disciplinary complaints since she took office. Further, when the OSC pursued prosecutions as a top priority during the O'Connor years, there were serious questions whether the complaints were prosecuted fully (the Spanton case), or on occasion were even retaliatory political prosecutions directed at the whistleblower (the Harvey case).

To deter whistleblower reprisals a far better substitute for OSC prosecutions would be the free market, through restoring the right of federal employees to file constitutional tort actions. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971). Through this means, frivolous cases would be screened out at the plaintiff's expense, and whistleblowers would not have lingering doubts that the most serious cases were cut short when the OSC pulled its punches due to political pressure. Besides taking the politics out of free speech prosecutions, this approach would upgrade federal employees from their current status as second-class citizens under the constitution by giving them the same access to court as all other Americans, including convicted felons.

5. One of the complaints you have about the OSC is that their letters to the whistleblower declining to pursue the case do not contain a detailed explanation for their refusal. It has been suggested that such a detailed letter could be used by the agency to further persecute the employee. Do you think this is a valid concern?

Initially, this would not be any concern under the House bill as currently drafted, since the OSC represents complainants. The letters explaining the decision not to file a complaint would be confidential under the attorney-client privilege, just as with letters from a private attorney to a prospective client, declining to take the case. Even without the attorney-client relationship, Congress by statute could designate correspondence between the OSC and complainants as confidential.

Overall, this is a paternalistic excuse that deprives employees of due process at the OSC, rather than a valid concern. One way to minimize this danger is through requiring a constructive format for closed case letters, where the OSC explains, legal element by element, the additional facts necessary for the complaint to warrant relief. Instead of drawing negative ultimate conclusions, the letter would inform an employee of the additional evidence to be obtained in order to successfully appeal.

At least it should be the employee's option to learn why s/he lost. The complainant should be entitled to findings of fact, the basis on the record and legal conclusions, upon request. Then the employee will have asked for it, if there should be further adverse consequences due to the contents.

Building on this premise, another approach would be to require oral briefings by the OSC to explain the decision. At the complainant's request, the explanation could be summarized in writing as described above. This would solve the problem of employee ignorance why s/he lost; avoid loss of credibility for the whistleblower if the decision were not on the merits; minimize the damage from an adverse decision on the merits coming back to haunt the employee; and facilitate a record for appealing the OSC's findings.

Finally, providing appeal rights to OSC findings, as suggested in #4, supra, should help neutralize any unjust results, if the Special Counsel uses its closed case letters as an opportunity to unfairly attack the whistleblower.

FALSE AND/OR MISLEADING TESTIMONY

It was extremely disappointing to hear Ms. Wieseman consistently misinform this subcommittee at the hearings on S. 508. Perhaps the most conceptual misinformation was that her arrival as a new Special Counsel has led to a "new OSC." At least according to the accounts received by GAP from whistleblowers, the new OSC is the same as the "old OSC" for reprisal victims -- a dead end at best.

Some of the highlights from the GAP survey (Exhibit 1) may be instructive here. All 15 respondents answered "no" when asked, "Did anyone at the OSC tell you your rights under the Civil Service Reform Act?" Only three out of 12 answered "yes" when asked, "Did the OSC return your phone calls?" Fifteen out of 15 answered "no" when asked, "Did the OSC make itself available to you for guidance and to answer your questions?" Two out of 14 respondents answered "yes" when asked, "Do you have any indication that the OSC reviewed all documentation you have provided since June 1986?" Only four out of 11 answered "yes" when asked whether there was an on-site investigation. None of the six complainants whose cases were rejected by the OSC answered "yes" when asked "[D]id the OSC provide you with a sufficient explanation that allowed you to understand the basis for the decision?"

The responses to several on-balance questions placed these experiences in perspective. When queried "Would you go again," only three out of 15 answered "yes," all with qualifications. (i.e.: "Yes, I would go back, but only if I could get someone to go along and witness some of their amazing behavior.") The final question in the survey was "On balance, based on your experience, do you believe that the Special Counsel has enhanced merit system principles?" The responses were 0 "yes," 15 "no."

The Special Counsel has asserted that the complaints of rejected whistleblowers should not be taken seriously, because the employees simply cannot accept that they lost their cases. In response, it is relevant that the survey answers came evenly from complainants who have cases pending and those whose reprisal charges were rejected.

More significantly, the criticisms of frustrated civil servants are consistent with the conclusions of such respected professional associations as the American Bar Association and the Federal Bar Association. Both organizations have supported passage of the Whistleblower Protection Act, in large part due to dissatisfaction with the Office of the Special Counsel. See, e.g., Resolution of the American Bar Association House of Delegates and accompanying ABA Administrative Law Section Report to the House of Delegates (August 1987), enclosed as Exhibit 4. Surely, these low marks from the ABA and the Federal Bar Association cannot be dismissed as mere sour grapes.

Specific inaccuracies in Ms. Wieseman's testimony are rebutted below.

1. Ms. Wieseman testified that the OSC does not slip information on complainants back to agencies. She added that the charge is "spurious" but has been made repeatedly by GAP.

GAP's repeated testimony reflects repeated complaints of this misconduct by angry federal employees. In one case, involving Ms. Lori Croskey, the OSC went so far as to delegate the agency/defendant Army to conduct key portions of the investigation. The conflict-of-interest is so extreme that the same local Judge Advocate General office responsible to defend the Army against Ms. Crosky in litigation also is conducting the "OSC's" factfinding for certain witnesses. Her Setpember 28, 1987 affidavit is enclosed as Exhibit 5.

2. Ms. Wieseman professed to be at a loss why anyone could question the objectivity of OSC's investigation into alleged reprisals against John Berter and other whistleblowers at the Cincinnati Veterans Administration Medical Center (VAMC), because the case is still pending.

The open status of the case is little solace for the complainants: the OSC already has create a credibility gap, through techniques such as --working out of, and interviewing witnesses in the office of the agency official charged with reprisal; refusing to talk with relevant supporting witnesses for the whistleblowers; mischaracterizing the testimony of supportive witnesses as being hostile to the whistleblowers; developing evidence to support the agency's charges against the employees when the OSC investigators discovered the agency didn't have any supporting information in key areas; repeatedly attacking the credibility of the whistleblowers and defending that of the agency to congressional staffers and the press; and working closely on the case with the VA Office of Inspector General, which for its part unsuccessfully attempted to have the whistleblowers prosecuted for making their police brutality charges.

The impressions of Dr. Mildred Katz, a witness in the case, help to explain why it is not necessary to wait for the investigation to be over, in order to realize something is wrong. In an August 3, 1987 affidavit (Exhibit 6), she stated,

> [T]he treatment I received from the Office of the Special Counsel (OSC) was rude and insulting to me, and to our patients, and totally indifferent to the suffering of the civil service employees whom in theory the OSC is supposed to protect.... Because of the strange behavior of the OSC and the VA, whose sole interest appears to be in attacking Messrs. Berter and Headley and anyone who supports them, I am very concerned about these men and other civil servants like them.

3. Ms. Wieseman defended the OSC's objectivity by its refusal to cooperate with an agency subpoena for its investigative file prior to a scheduled MSPB hearing in Mr. Berter's appeal. But witnesses report the OSC compromised their testimony through more informal, but equally obvious means. For example, the defendant police chief has been within earshot in his trailor while the OSC interviewed a witness in the trailor. Witnesses reported to GAP that shortly before the scheduled MSPB hearing the OSC investigators spent extensive sessions with the police chief and agency management officials. The OSC's behavior is a case study in the potential dangers of ex parte contacts.

4. Ms. Wieseman asserted that it is not the OSC's responsibility to go after police misconduct. But the OSC illegally waited some 16 months before forwarding reasonable charges of police brutality that were made in connection with the whistleblowers'request for help against the reprisals. See 5 USC 1206(b)(2). After this subcommittee's hearings on S. 508,the OSC recognized its duty and forwarded the evidence when the Special Counsel received a formal request from Mr. Berter. But even then the Special Counsel gave the VA complete discretion on how to respond, instead of ordering a serious investigation of brutality charges supported by literally dozens of witnesses. Relevant correspondence is enclosed as Exhibit 7.

Here the OSC's weak performance illustrates the need to strengthen the civil service channels to disclose and challenge fraud, waste and abuse. Merit Systems Protection Board (MSPB) studies have revealed that lack of confidence in the effectiveness of channels to dissent has a greater chilling impact than fear of reprisal.

5. Ms. Wieseman testified falsely that by withdrawing his MSPB appeal, Mr. Berter sacrificed his existing individual

remedies. He currently is seeking relief under the Privacy Act, however, through which he is entitled to a jury trial and damages. Further, Mr. Berter can file a constitutional action in equity, for injunctive relief, if he reapplies to the VA for a job and is denied employment in reprisal for his dissent.

Ms. Wieseman's misstatements illustrate another potential danger that should be addressed in S. 508 -- nonpreemption of statutory remedies such as the Privacy Act merely because a reprisal is also covered by the Reform Act. Losing currently-effective remedies could prove to be more significant than gaining the benefits of S. 508. Whistleblowers have a far greater chance to obtain relief under these alternative statutes than under the Reform Act. The House already has addressed this issue in H.R. 25 with a non-preclusion clause. The Senate should follow suit.

6. In the same vein, Ms. Wieseman testified that Mr. Berter could have had a full hearing and resolution of the same issues covered by the OSC, if he had not withdrawn his appeal. Unfortunately, the second half of her observation may prove to be correct. In making this assertion Ms. Wieseman ignored GAP's previous testimony that the groundrules for the MSPB hearing would have --

*refused evidence on the whistleblowing defense;

*refused testimony from the majority of proferred witnesses, including victims and all the other whistleblowers;

*limited the issues in the appeal to whether the agency could support its charges. Unfortunately, that issue is only of indirect relevance in an appeal based on the reprisal defense. Legally the issue is supposed to be one of motives -- whether the agency would have fired the employee, here Mr. Berter, in the absence of his whistleblowing activities.

In short, Ms. Wieseman's endorsement of the MSPB approach here is faint basis for confidence in her own standards. More significantly, the MSPB restrictions illustrate why the formal appeal process needs healthy competition, such as through arbitration.

7. Ms. Wieseman falsely testified that GAP withdrew its representation of Mr. Berter. As she knows, we continue to represent him actively before the OSC. Had she inquired, we would have informed her that he decided to shift from an MSPB appeal which promised to frustrate the chance for a full hearing on the relevant issues, to a Privacy Act process in which he has confidence. Had Ms. Wieseman asked, GAP would have told her that GAP has complete confidence in Mr. Berter and will continue representing him until he achieves justice.

8. Ms. Wieseman asserted that her track record of six

successes for whistleblowers exceeds that of GAP or other public interest groups. This statement not only was ignorantly false, but was also irrelevant beyond the insights it offers. In fact, had Ms. Wieseman checked she would have learned that GAP's pace and success rate in formal litigation exceeds the OSC's claimed rate of success through informal agreements, without even considering the far more numerous whistleblower victories GAP achieves through settlement.

It is hardly good news that a public interest group, with one-eighth the budget and far less access to evidence, consistently outpaces the Office of the Special Counsel. It is obvious evidence that the civil service system is not working.

Instead of comparing the OSC's success rate with that of agency critics, Ms. Wieseman should focus on whether the combined efforts of public and private advocates have effectively protected freedom of speech. Nothing would make us happier at GAP than if the Special Counsel's whistleblower successes overwhelmed our own. We would like to return to our pre-1981 role as cheerleaders and supporters who regularly refer cases to the OSC, as was GAP's practice before Special Counsel Alex Kozinski reversed the agency's mission in 1981. We painfully recognize that GAP has failed to effectively defend freedom of speech during the current adminstration, either through preventing a repressive environment in the civil service, or even by formally helping more than a small minority of those who call us and deserve assistance. The task is too great for there to be competition among genuine free speech advocates.

This subcommittee will know that the OSC is on the road to recovery, when Ms. Wieseman shows more interest in correcting the agency's mistakes than in attacking her critics; and when she asks for stronger rights protecting freedom of speech, instead of arguing they are unnecessary. Whoever wins the arguments between the Special Counsel and its critics, the loss of confidence by federal employees in her agency and the MSPB should be beyond dispute. In short, even if Ms. Wieseman's testimony were completely accurate, the need for legislative reform is as strong as last year if civil service law is to attain legitimacy.

Sincerely,

Thomas Devine

Thomas Devine
Legal Director

STATEMENT BY LOEBE JULIE
PRESIDENT
COALITION TO STOP GOVERNMENT WASTE
TO
FEDERAL SERVICES, POST OFFICE AND CIVIL SERVICE SUBCOMMITTEE
July 14, 1987

Mr. Chairman, I am Loebe Julie, president of the Coalition To Stop Government Waste, a 70-thousand member nonprofit, national, grassroots organization that exposes waste in the federal government and supports legislation to stop ongoing waste, fraud and abuse of tax dollars. I am here to urge that this subcommittee *reject* the proposed Whistleblower Protection Act of 1987 (S. 508) *unless it is substantially strengthened.* The current Act, as passed in the House, will not encourage whistleblowers to come forward, nor will it provide sufficient protection for employees who expose corruption as required by the Congressional Code of Ethics for Government Service.

Famous corruption fighters like prosecutor Rudolph Guiliani, the many reform committees of the Congress, popular media watchdogs like "60 Minutes" and "20-20" and even our own Coalition to Stop Government Waste, aren't the first line of defense against corruption. *We are only the second line. The first line of defense against corruption is the ethical employee who reports corruption--the so-called whistleblower.*

This critically important role of the ethical government employee was recognized by Congress when it adopted the Code of Ethics for Government Service. In part IX of the Code the Congress of the United States has required that, "Any person in Government service should .....*Expose corruption wherever discovered.*"

Simultaneously with the issuance of the Code, the Congress enacted legislation intended to safeguard the ethical employees who fulfilled their Congressionally mandated responsibility to blow the whistle on corruption. Tragically, that whistleblower protection legislation was a failure. As a result, instead of honoring them for their efforts, the "system" has destroyed the jobs, careers, lives and families of thousands of ethical government employees who exposed corruption.

Today, Congress has the following alternatives available to right this tragic wrong:

1. The most attractive alternative is to add to the presently proposed update of the Congressional whistleblower legislation the options, for *deserving* whistleblowers, of *guaranteed immunity* and *fast, fair, efficient* and *affordable* alternate dispute resolution (arbitration).

2. Without the addition of these options the proposed legislation *will not stop* the continuing damage to thousands of ethical government employees and their families. Rather than continue that damage, the only other fair alternatives for Congress would be to either:

   a. Repeal the important Section IX of the Code of Ethics

   b. Repeal the provisions of the Whistleblowers Protection Act (Civil Service Reform Act of 1978) as originally enacted and abandon the inadequate update of that act now proposed.

Our Coalition is urging that Congress adopt the *first alternative*. In addition to the descriptive material presented in the following pages, we have outlined (see Appendix A) a scenario to show how the options for *real immunity* and *arbitration* could operate if these options were included as amendments to the proposed Whistleblower Protection Act of 1987.

The first alternative truly protects deserving whistleblowers and encourages would-be corruption fighters to speak out without fear of reprisal.

I have attached a petition calling for this alternative, approved by 70 of this country's best-known and respected whistleblowers and whistleblower supporters.

BACKGROUND

One of the primary objectives of our Coalition is to make government safe for those men and women who sacrifice their careers and jeopardize the welfare of their families -- the government whistleblowers.

Without thousands of these patriotic, whistleblower watchdogs securely in place to protect the taxpayers against agency incompetence, inefficiency and abuse, the war against government waste will be lost. Like the Congressional Code of Ethics, we *refer to them as corruption fighters* because that's what these courageous people really do for our country.

Today, we are losing that war on waste and one major reason is the lack of whistleblowers.

A study by the Merit Systems Protection Board (MSPB) of whistleblowers showed that government employees fail to expose waste and corruption for two reasons: one, fear of retaliation by government supervisors; and two, belief that no action will be taken to correct the abuses after they have been exposed.

Although Congress originally attempted to develop effective legislation to protect whistleblowers, it is widely recognized that the legislation has been a disastrous failure. It is clear that the new attempt, the updated Whistleblower Protection Act of 1987 will, as now written, fail for the same reasons as before.

First, the updated legislation provides no real immunity (i.e., job protection *in fact* as opposed to job protection *in theory*) for the employee who obeys the Code of Ethics requirement by exposing corruption.

Second, the updated legislation fails to provide *any unbiased, efficient, inexpensive and expert forum* to examine the employee's allegation and the consequences he may have suffered because of his exposure. Instead it relies on the same government office it used before (with terrible results). Under some circumstances, it provides for access to the courts.

As we now know, the Office of Special Counsel (OSC), established in 1978 to represent whistleblowers against reprisals and false charges by government supervisors, has never done so. The appointees to that office have repeatedly refused to assist whistleblowers, as has the MSPB.

For very fundamental reasons it is impossible for either this type of captive government office or the civil courts to protect the jobs, careers, lives and families of ethical employees who follow the requirements of the Code of Ethics and expose corruption. There are, in fact, two things in life that are certain besides death and taxes. One is that *any office of a large bureaucracy tasked to function as a watch dog of that bureaucracy will eventually act to protect that bureaucracy.*

Recently Congressman Sikorsky put this fact most succinctly in referring to the Office of Government Ethics which, like the OSC and MSPB, is also a captive of the government bureaucracy. Both Senator Levin and Congressman Sikorsky have been severely critical of this office because of its failure to do its job. In the Congressman's words *instead of being a watchdog the Office of Government Ethics has functioned like a "toothless terrier on valium."* We can predict with certainty that again entrusting to OSC the jobs, careers, lives and families of thousands of ethical government employees who "expose corruption wherever discovered" will be *again abandoning them to "a toothless terrier on valium."*

The other certainty is that *resort by honest citizens of modest means to the civil courts* results in *outrageous delays, outrageous costs* and consequently, in almost all cases a *failure to achieve justice*. For this reason, civil court procedures have been recognized, by legal experts and the public alike, as badly flawed. See, for example, the New York Times article, Saturday, March 7, 1987, attached. We can predict with certainty that proposing civil court remedies will not protect honest federal employees, and it will not permit them to safely "expose corruption wherever discovered."

OUR COALITION'S 1986 AND 1987 LEGISLATIVE PROPOSALS

Since 1986 our Coalition has proposed strengthened legislation that would provide adequate protection, immunization and rewards for ethical employees who expose corruption, and appropriate punishments for their persecutors.

It is a matter of deep concern that, notwithstanding Congressional legislation, honest employees *dare not* expose corruption. In virtually every case, where they have tried, they have found themselves abandoned by the government they tried to help. Agencies have been allowed to *wrongfully convert* millions of U.S. taxpayers dollars each year to *funds for whistleblower persecution*. Congressionally appropriated tax dollars intended for legitimate agency tasks have been diverted to cover enormous legal and administrative expenditures devoted to harassing, investigating, stonewalling, punishing, prosecuting and even imprisoning whistleblowers.

This abuse of government power has forced individuals who obey the Code of Ethics into an impossibly one-sided, *"David"* role in which they must battle *against the entire federal government "Goliath"* with virtually no chance of winning back their jobs, their reputations or their dignity.

Despite Congressional intervention and concern the *persecution* of corruption fighting government employees is getting worse instead of better. During the past year an employee of the Education Department (Mark Price) who exposed *subsequently admitted corruption* in that Department was not only harassed, threatened and fired but also *jailed by the courts for one year on charges of two misdemeanors!* (See attached open letter to President Reagan, also [illegible] stories "Whistleblower: How the System Fired, Imprisoned and Silenced Mark Price" and "[illegible] of Blowing the Whistle", Judy Jones and Alice Allred Pottmeyer, Utah Holiday Magazine, July 1987*)*.

The current Whistleblower Protection Act of 1987, as now written, does not right these flagrant wrongs.

Our 1986 proposal included provisions for arbitration and what we referred to as the three P's of whistleblower protection -- Privilege, Punishment and Payment. (See Appendix A and Appendix B attached). We have during the past year generated additional data with regard to these four key provisions for the use of committees of the Congress preparing whistleblower protection legislation.

Data collected concerning arbitration shows that it has been widely adopted by *both the public and private sector* as by far the fastest, cheapest, fairest, most expert and most practical method of dispute resolution.

Nineteen states use various forms of arbitration as the most practical, efficient and affordable method of resolving disputes.

Arbitration is also being used by a large number of federal agencies to resolve disputes. A list of these agencies, developed by the Administrative Conference of the United States, is attached to this statement.

Arbitration is now being used by the federal government to resolve personnel disputes where authorized by union contracts. In 1960 when arbitration was authorized by Executive Order, it was *non-binding*, but a subsequent Executive Order made it *binding*.

Relative costs and speed are demonstrably 10 to 50 times better for proceedings of the American Arbitration Association than for civil court proceedings.

Specifically, we have obtained estimated arbitration cost figures from the American Arbitration Association of $200 to $1,500 per case with dispute resolution times of two or three months. By contrast, civil court proceedings cost tens to hundreds of thousands of dollars and drag on for years.

Bertrand Berube, a federal government whistleblower who suffered from retaliation, estimates:

- If you are fired or demoted after alleging that your boss was involved in waste, fraud or mismanagement, you can expect to pay $20,000 to $50,000 in legal fees and spend six months to a year pursuing your case.

- If you challenge the government agency you work for, as Mr Berube did in 1977 and 1981, expect to spend $50,000 to $200,000 and six months to 2-1/2 years on the case.

- If you take on the federal administration, the case may cost $400,000 to $700,000 and could last six years or longer.

CONCLUSION

Protecting vulnerable whistleblowers is a challenging but not impossible task. Attached to this statement is an article from the Washington Times of October 22, 1986, headlined "General Salutes Whistleblowers."

The article said: After Lance Corporal Lisa Brancucci blew the whistle about the Marine Corps being charged $150 for an 89 cent nut, *Marine Commandant General Paul X. Kelley directed Corporal Brancucci be promoted "before the sun sets in California. The system should not get whistleblowers, such as Corporal Brancucci," General Kelley said, "but should promote them."*

We agree with General Kelley! Corporal Brancucci received a fast, effective and highly appropriate reward for her whistleblowing services. We believe that it is time for her fellow federal whistleblowers to receive a similarly appropriate award *"before the sun sets on Capitol Hill."* We believe that the alternative we have proposed will provide the mechanism (see the scenario outlined in Appendix A) that will open the door for effective whistleblowing.

Basically, this alternative will:

1. Protect the corruption figher and immunize him or her against retaliation.

2. Provide reward incentives for disclosures of agency waste and abuse.

3. Provide effective punishment deterrents against agency attempts to coerce or harass the whistleblower for exposing corruption.

4. Authorize an efficient and independent arbitration option as the only practical method for quick, impartial, inexpensive and expert dispute resolution to resolve the facts in cases of harassment of whistleblowers.

We are proposing this alternative as an option, to be elected by the employee, which would not preclude his exercise of any of the other channels of relief provided by the legislation.

Our members, together with the 70 individuals who joined in our petition, urge you to incorporate these essential provisions in your proposed legislation. This will provide the support we need for the principles of the Congressional Code of Ethics for Government Service and for the critically important Congressional battle against waste and mismanagement in the federal government. Absent these strengthening provisions, this legislation *will fail to give the thousands of honest federal employees who "expose corruption wherever discovered" the honors they deserve. Instead it will once again act to destroy their jobs, their careers, their lives and their families.*

APPENDIX A

A SCENARIO FOR THE REAL IMMUNITY AND ARBITRATION OPTION

A possible scenario for the operation of the real immunity and arbitration options is as set forth below:

1. The original disclosure by the employee can be made on a fully protected basis by having the employee report his disclosure of corruption to an agency of the government maximally independent of the agency to which the employee belongs. The likeliest candidate for receiving and registering the disclosure is the existing fraud hot line service of the General Accounting Office (GAO). The scenario for the whistleblower would be to use this fraud hotline and, in return for receiving an official ID (case number) registering and immunizing his disclosure, to disclose his allegations and, usually, his identity.

2. Registry with the GAO fraud hotline would create an automatic freeze of the employee's job status (temporary immunity). During this period of temporary immunity (approximately 50 days) any attempt to change the employee's job status would be both a nullity and a violation of law subject to a Congressionally stipulated penalty. The only permissible exception to the freeze would be for changes specifically requested by the employee, in writing, with the proviso that the employee's request has been made without duress. The immunity could either be appropriately terminated at the end of the 50 day period or appropriately extended as described below.

3. Within five days after registering his protected disclosure with the GAO fraud hotline the employee (or if Congress deems it preferable, the GAO) would initiate an arbitration proceeding with the arbitration organization designated under this legislation. Standard arbitration procedures for dispute resolution would be followed except for the requirement that accelerated procedures be followed to ensure that the arbitration process be completed within 45 days. If Congress wishes, an extension of this time period could be grantable at the request of both parties (the employee and the agency).

4. In order to be best able to fairly adjudicate large numbers of cases of reported corruption or mismanagement throughout the United States, the designated arbitration organization should have the following characteristics:

    a. It should be national in scope with offices throughout the United States.

    b. It should have a large panel of arbitrators available, preferably including arbitrators serving on a pro-bono basis, with minimal direct or indirect dependence on the federal government.

    c. It should be an organization of sufficient size and financial strength to be maximally independent of and beyond the direct or indirect control of the federal government.

    d. It should be a non-profit organization so as to be maximally free of conflicts of interest or bias in favor of the federal government. It should be recognized that a for-profit arbitration organization could easily become captive since it would perceive the government to be its largest and most valuable customer.

5. The referral of the whistleblower allegations to the Congressionally designated arbitration organization would start normal arbitration machinery. The whistleblower could elect a standard panel of either a single arbitrator or three arbitrators to hear his dispute. In either case, the costs and delays of the arbitration are extremely low, typically less than $1,000 dollars and 45 days, compared to costs of tens to hundreds of thousands of dollars and years of delay for other methods of dispute resolution.

6. The decisions of the arbitrator(s) will be based on the evidence submitted by the employee and the agency and will deal with the merits of the employee's disclosure of corruption or mismanagement, together with the merits of any proposed agency personnel actions against the employee. The purpose of the arbitration will be not only to protect those honest employees who

expose corruption but equally *to protect government agencies against false allegations or unfair harassment by incompetent employees.* In the simplest terms the arbitrator(s) will have to weigh whether the case involves a "good" or "bad" employee and whether it involves a "good" or "bad" exposure of corruption or mismanagement.

7. The scenario first considers the case of protecting the agency against a bad employee (i.e., an employee with an unsatisfactory personnel record as of the date on which the whistleblower allegation was filed with the GAO fraud hotline) who makes a bad (frivolous or false) exposure. Should the arbitrator(s) find this to be the case, their decision will immediate terminate the employee's job status freeze and will close the case without further action. This permits the agency to proceed with any pending employee disciplinary actions, justifiably based on the employee's record of poor performance. By requiring that the arbitration decision be rendered within forty-five days, there would be a maximum of a fifty day delay in any personnel actions the agency had pending against the employee. *Such a short delay is negligible compared to the lengthy delays typical of personnel actions taken under the civil service system.*

8. The arbitrator(s) decisions next concern those cases where they find a good employee (i.e., an employee with a satisfactory personnel record as of the date on which the whistleblower allegation was filed with the GAO fraud hotline). Where the good employee has made a valid disclosure of corruption or mismanagement, the arbitrator(s) will render a binding decision extending the employee's immunity. The effect of this extension of immunity will be to permit the employee to return to arbitration machinery if he believes there have been any agency actions against him resulting, even in part, from his disclosure. The arbitrator(s) decision can also rule on appropriate monetary rewards or changes in job rank or responsiblity for the whistleblower based on legislative provisions set forth to reward whistleblowers.

9. The arbitrator(s) will also render a decision as to the whistleblowers' allegation of corruption or mismanagement. Whereas the arbitrator(s) decisions relating to employees will be *binding*, their findings relating to the exposure of corruption or abuse will be *fact finding and nonbinding*.

10. In the case where the arbitrator(s) find that a good employee has made an allegation of corruption or mismanagement that is not sufficiently substantiated, the arbitrator(s) decision will so find with respect to the allegation. It is clearly not the intent of the Congressional Code of Ethics that a good employee making a mistaken or not fully proven exposure of corruption be penalized for so doing. Therefore, in such a case the arbitrator(s) decision will continue the employee's immunity against reprisal on the same basis as for a good employee making a good allegation.

11. The final case to be considered is that of a bad employee making a good (i.e., substantiated) allegation of corruption, mismanagement or other serious wrongdoing. It is recognized in all areas of the law that we motivate individuals to expose corruption and that even if the individuals responding to such motivations are criminal, we immunize them in whole or in part in return for their exposure of significant levels of corruption. The arbitrator(s) in such a case may decide, based on the circumstances of the case, to extend the immunity for such a bad employee, making a good allegation, on a reasonable basis. For example, unless the employee's past record shows that he is guilty of unpardonable offenses, the arbitrator(s) may pardon prior offenses without, however, excusing future infractions by the employee. The employee could return to arbitration if he felt that his personnel record did not warrant subsequent penalties imposed by the agency and that the agency's action resulted, in whole or in part, from his disclosure.

12. Finally, the arbitrator(s) will have the power to award costs to the whistleblower and, if employees of the agency have testified or acted in violation of specific laws and titles of the government, for example Title 18 Section 0001 of the U.S. Code, the arbitrator(s) will have the power to rule that the specific penalties provided by such regulations be applied to the violative employee or employees. These rulings, together with all arbitration rulings related to personnel, whether concerning the whistleblower or other employees of the agency shall be binding.

APPENDIX B

THREE P'S OF WHISTLEBLOWER PROTECTION--PRIVILEGE, PAYMENT, PUNISHMENT

a. Privilege

I refer here to the privileged immunity extended to individuals in exchange for valuable information usually provided to prosecuting agencies. The price normally paid in exchange for such important information is to protect and immunize the source against any and every conceivable kind of reprisal. This immunity, which even extends to amnesty for wrongful behavior by the source, is a small price to pay for critically important information. The government whistleblower, who is generally the antithesis of a wrongdoer, is certainly deserving of immunity and amnesty in return for providing his information.

b. Punishment

There has always been a gross failure to punish the real wrongdoers in the system -- not the whistleblowers, but those officials guilty of misfeasance, malfeasance, nonfeasance, waste, fraud or abuse. Such punishment is permitted under civil service rules. For example, after my company Julie Research Laboratories successfully blew the whistle, a finding by the Inspector General of the Army led to the disciplinary transfer of 20 procurement employees of the Army. Other than outright discharge, the punishment of choice to deter further abuses and to prevent reprisals against whistleblowers is transfer of the individuals guilty of abusive practices to other departments of the government. Transfer is not as difficult to accomplish under civil service rules as discharge, demotion or fine and should be mandatory. The other available punishments, including prosecution of wrongdoers under applicable codes, such as Title 18, Section 0001 of the U.S. Code, should be resorted to whenever possible.

Presently applied small fines ($1,000) are useless deterrents to continued corruption, or continued serious mismanagement or abuse. Furthermore, only outright discharge or geographic transfer of the wrong-doers provides an effective safeguard for the honest employee against a possible future retaliation. Fines or demotions, while desirable as secondary forms of punishment, leave in place a wounded and very dangerous adversary, fully capable of eventually destroying the honest whistleblower.

c. Payment

Perhaps the only highly successful whistleblower case history, is that of William Clinkscales of the General Services Administration. Clinkscales received his payment from President Reagan in the form of a promotion in pay, rank and responsibility. From every point of view, promotion is clearly the reward of choice for successful whistleblowers and should be made mandatory. Additional forms of reward, whether lump sum payments or percentages of savings realized by the government, have been proposed and can also be used.

A frequently proposed legislative alternative to payment or promotion for whistleblowing consists of large cash awards (bounties) which must generally be obtained as a result of a winning whistleblower civil court action. *We oppose bounties as do federal agencies and many legislators.* Our reason for opposition is that such bounties punish, not the guilty individual or agency, but the innocent taxpayer and, therefore, represent the most expensive and least equitable reward incentive for whistleblowers.

By contrast, a promotion is inexpensive, appropriate and efficient. As in the promotion of William Clinkscales, or of Lisa Brancucci by General Kelley, it puts the corruption fighting rewardee in a stronger position to carry on his or her corruption fighting and to resist any potential harassment or reprisal for whistleblowing.

PETITION

To Members of the United States Congress On Behalf of United States Federal Whistleblowers

Sponsored by

COALITION TO STOP GOVERNMENT WASTE
119 Constitution Ave, NE, Washington DC 20069

Whereas it is necessary and desirable for all federal employees to be corruption fighters and to act as watchdogs of the public good by "blowing the whistle" on misfeasance, nonfeasance, malfeasance, waste, fraud, abuse, mismanagement and inefficiency in the federal government;

Whereas in countless documented cases these patriotic corruption fighters have been persecuted, fired, hounded, harassed, forced to resign, transferred to less desirable locations and falsely given poor performance ratings by superiors for reporting such waste, fraud, and abuses;

Whereas this abuse of government power has forced the individual corruption fighter to wage an impossibly one-sided, David-and-Goliath battle against the government with virtually no chance of winning back his job, his reputation or his diginity;

And whereas under current law there is no effective protection for government employees against retaliation;

Now therefore, as federal whistleblowers or supporters of whistleblowers, we believe that any legislation written by the 100th Congress to encourage honest government workers to expose corruption, ***must*** include the following provisions:

1. Protect the corruption fighter and immunize him against retaliation;

2. Authorize arbitration as the only practical method for quick, impartial, inexpensive and expert dispute resolution to resolve facts on specific cases of agency waste, fraud, abuse and corruption;

3. Provide reward incentives to whistleblowers, in the form of promotion in rank and responsibilty, for disclosures of systemic agency waste and abuse; and

4. Provide effective punishment deterrents in the form of discharge, demotion or transfer of culpable government supervisors to preclude harassement of whistleblowers for exposing corruption.

The country's dedicated, corruption-fighting federal whistleblowers will only be adequately motivated, protected and rewarded, ***when these four points have been enacted into law.***

We, the undersigned, respectfully urge you to include these four points in the current whistleblower protection bill.

George Spanton
Singer Isalnd, FL

Carla Hein
Santa Anna, CA

Mark Price
Alexandria, VA

Lynda Price
Alexandria, VA

Bill Bush
Hunsiville, AL

Richard Krodel
Washington, DC

Phyllis Lippay
Shamokin, PA

Deena Weinstein, Ph.D
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Charles Olson
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Joseph Halldorson
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Thomas Devine
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Louis Clark
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Loebe Julie
New York, NY

Dick Hafer
Lanham, MD

Harold Hann
Naperville, IL

Joe Halderson
Arlington, VA

Delores Sutton
San Antonio, TX

Albert Sutton
San Antonio, TX

Don Montgomery
Baytown, TX

Gail McBride
Chicago, IL

Peter Insante
Washington, DC

John Moffet
Washington, DC

Britt Register
Vidalia, GA

Susan Register
Vidalia, GA

Leslie Price
Jacksonville, FL

LOEBE JULIE

ANSWERS TO QUESTIONS

SUBMITTED BY SENATOR DAVID PRYOR

Question 1: What will prevent a dishonest employee from using this to stay a legitimate personnel action?

Answer to 1: Dishonest employees making valid exposures of corruption ought not to be discouraged, because substantial benefits to the public result from exposures of corruption, whatever the source. Though difficult to quantify, it is reasonable to expect that hundreds of millions of dollars can be saved as a result of such exposures.

An inherent deterrent exists for dishonest employees with frivolous cases, viz., they would be committing professional suicide. Moreover, a 50-day stay of an action pending against such an employee is negligible compared to other delays in the civil service process.

Finally, the underlying principle of our entire system of justice is that we prefer to let guilty persons go free rather than risk punishing the innocent. Without our proposal, this basic principle of justice is turned on its head. Many innocent employees will be punished rather than risk a guilty one escaping punishment for a few days!

Question 2(a): At what point in the administrative grievance process would you have the arbitration process begin?

Question 2(b): Would all other administrative remedies have to be exhausted first?

Answer to 2(a), 2(b): The arbitration process, proposed not as a replacement but as an optional alternative to the OSC and MSPB, would begin at the initial stages of the administrative grievance process. See paragraphs '13', '14', and '15' of the attached Extension to the Arbitration/Immunity Secenario.

Question 2(c): Would you allow an arbitration agreement to be appealed to the court system by either party?

Answer to 2(c): As stated in paragraph '9' of the Arbitration/Immunity Scenario of Attachment A to my testimony and paragraphs '16 b' and 'c' of the attached Extension: "Whereas the arbitrator(s) decisions relating to employees will be binding, their findings relating to the exposure of corruption or abuse will be fact-finding and non-binding."

By definition binding arbitration can be appealed to the court only if:

- the decision was procured by fraud, collusion or other similar and unlawful means; or
- the arbitrator exceeded his or her jurisdiction.

Also by definition, the optional fact-finding (non-binding) portion of the arbitration ruling is advisory only. It would be unnecessary for the agency to appeal this portion of the ruling to the courts since it could simply be ignored.

Question 3(a): What would keep arbitrators or the investigators, who would presumably work for the arbitrators, from becoming "captive" as well?

Answer to 3(a): As stated in paragraph '4' of the Scenario, the selection of a large, national, independent arbitration organization guards against this. The standard procedures of the American Arbitration Association will permit the selection of impartial arbitrators from a list of 60,000 individuals and allow the whistleblower to screen out individuals who might be "captive" to the government.

Question 3(b): Do you envision arbitrators making decisions on both personnel actions and the allegations of fraud or waste?

Question 3(c): If so, would he be empowered to punish the person who committed the fraud or waste, such as a contractor?

Answer to 3(b), 3(c): As stated in paragraph '12' of the Appendix to my testimony: "...if employees of the agency have testified or acted in violation of specific laws and titles of the government, for example Title 18, Section 0001 of the U.S. Code, the arbitrator(s) will have the power to rule that the specific penalities provided by such regulations be applied to the violative employee or employees. These rulings, together with all arbitration rulings related to personnel, whether concerning the whistleblower or other employees of the agency, shall be binding." As also stated in paragraphs '9' and '16', the optional portion of the arbitration decision concerning the employees' allegation would only be advisory to the government and would only be of assistance to an appropriate agency of the government in government actions to punish the contractor.

Question 3(d): Would the arbitrator make decisions based on civil service case law?

Question 3(e): If not, what standards would guide the arbitrator's deliberations?

Answer to 3(d), 3(e): Although an arbitration decision is not bound by case law, the arbitrator requests that closing briefs list all relevant existing case law, together with a discussion of its bearing on the case. The arbitrator also affords each side the opportunity to refute the other side's brief.

Question 4(a): Would you have the arbitrator decide what the appropriate reward for whistleblowing would be?

Question 4(b): Using what standards?

Answer to 4(a), 4(b): The arbitrator could decide on an appropriate award to a whistleblower based on any Congressionally established law or regulation providing a legal basis and standards for granting such an award.

Question 5: As a punishment to those who have taken a prohibited action against the whistleblower, you propose termination or transfer to a new geographical location.

a: Would the arbitrator make the determination?

Answer 5(a): Since the purpose of the proposed act is to protect against and prevent prohibited actions against whistleblowers, there should be appropriate degrees of punishment available under the act to provide the desired preventive and protective effect.

Normally available degrees of punishment are:

i. fine;

ii. transfer or demotion; or

iii. termination.

The arbitration decision would first establish which of these three degrees of punishment is appropriate, based on the evidence in the case. Provided that the violative individual testified and presented evidence in his own defense as part of the proceeding, the arbitrator's ruling could order the individual fined (for a first-degree violation) or terminated (for a third-degree violation). Where the arbitrator rules that there has been a second-degree violation, the agency would be required to carry out the arbitrator's ruling by administering the agency's choice of either a transfer or a demotion.

Question 5(b): Would the person against whom this action has been taken have legal recourse?

Answer 5(b): In cases where the law provides for the submission of additional testimony or evidence or for further investigative or appeal proceedings to afford the violative individual full due process rights, the arbitrator's decision concerning punishment would be administered by the legally appropriate agency of the government.

Extension to the Arbitration/Immunity Scenario

13. A government employee may make a protected whistleblower disclosure of corruption or wrongdoing, as defined by Section 2, Paragraph a of the Whistleblower Protection Act (S. 508), directly or indirectly, to any supervisory channel of the government or to the Inspector General or to the Office of Special Counsel or to the GAO fraud hot line. In the majority of such disclosures it is expected that the disclosure would not be contested by the agency and would result in a cure of the disclosed problem, without reprisal to the whistle-blower. If the disclosure is made to the IG or GAO, the employee shall immediately receive an ID number referencing his disclosure and receive a written confirmation within 48 hours.

14. Under the proposed act it is unlawful, if the disclosure meets the act's definition of a whistleblower action, to worsen any condition of employment of the employee without allowing the employee dispute resolution by his choice of Office of Special Counsel, civil court, or fast track (45 day maximum) dispute resolution by the American Arbitration Association. Any attempted change in employment conditions would be a nullity, and any individual guilty of attempting such a change would be subjected to punishments provided for in the act.

15. Whichever entity resolves the dispute shall weigh the employee's past personnel record including the employee's past history of disclosures of corruption or other improper actions covered under the Whistleblower Protection Act definition.

16. In the case that the dispute resolution entity is the American Arbitration Association:

a) If the employee has a bad personnel record without any mitigating disclosures in the public interest of waste, fraud or other improprieties, the AAA decision shall immediately remove the whistleblower's job status immunity, ending his protection under the act. This decision by the AAA shall be based on evidence received from the employee and the agency and should take a maximum of 45 days, but may be accomplished in substantially less time following receipt by the AAA of evidence from both parties. Any agency submissions alleging improprieties or incompetence by the whistleblower will only be admissable as evidence if the employee's act occurred prior to the protected disclosure date, and any evidence collected after the disclosure date in support of allegations against the employee will be inadmissable.

b) If the employee's immunity is not removed in accordance with paragraph 'a' the AAA binding decision shall reaffirm the employee's immunity, assert the employee's right to return to arbitration in case of a subsequent reprisal which the employee believes is related to his whistleblowing, and rule on any appropriate personnel rewards or punishments provided under this or other Congressional legislation.

c) The AAA ruling may include a non-binding opinion (fact-finding) concerning the problem disclosed by the employee, including its non-binding recommendation for a cure or a further investigation of the problem by the government.

17. Where the agency has clear and convincing evidence that the employee disclosure is false, frivolous or does not fall within the definition of the act and has been filed by an employee against whom the agency has a disciplinary action pending, the agency may proceed with such disciplinary action by first giving the employee 50 days notice of its intentions. If the employee immediately files for fast-track dispute resolution by the AAA, its decision will be binding and take precedence over any proposed disciplinary action by the agency. If the AAA decision is delayed by special and unusual circumstances, the agency's proposed personnel action will be automatically stayed until the AAA decision has been filed.

STATEMENT OF
MARY F. WIESEMAN, SPECIAL COUNSEL
OFFICE OF THE SPECIAL COUNSEL

BEFORE THE
SUBCOMMITTEE ON FEDERAL SERVICES, POST OFFICE, AND CIVIL SERVICE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ON

S. 508

"THE WHISTLEBLOWER PROTECTION ACT OF 1987"

JULY 31, 1987

Mr. Chairman, Members of the Subcommittee, and Senator Levin:

I want to commend both you and Senator Levin for your interest in the subject of whistleblower protection, an issue of mutual concern. Prior to my tenure as Special Counsel, I served as Chair of the Legislation Committee of the President's Council on Integrity and Efficiency, and worked actively to marshal the support of the Inspectors General for important new anti-fraud measures. These included the "Anti-Kickback Act Amendments of 1986," introduced by Senator Levin, and representing a major contribution to the array of tools available to the Government in the prevention and detection of fraud and abuse in Government contracting. Once again, both Senator Levin and this Subcommittee have identified an issue of mutual interest and concern, AND THE ADMINISTRATION IS VERY PLEASED TODAY TO BEGIN WHAT IT HOPES WILL BE A CONTINUING AND PRODUCTIVE DIALOGUE ON THE IMPORTANT SUBJECT OF WHISTLEBLOWER PROTECTION. WHILE MY TESTIMONY WILL HIGHLIGHT SOME RESERVATIONS ABOUT THE BILL IN ITS PRESENT FORM, IT WILL ALSO OFFER SOME PROPOSALS THAT WE HOPE WILL ADD SOME MEASURE OF ADDITIONAL PROTECTION AND SOME USEFUL NEW TOOLS IN THIS AREA. THE ADMINISTRATION LOOKS FORWARD TO WORKING WITH THE SUBCOMMITTEE IN THE DEVELOPMENT OF THESE AND ANY OTHER CONSTRUCTIVE PROPOSALS TO ENCOURAGE AND PROTECT EMPLOYEE DISCLOSURES OF VIOLATIONS OF LAW, WASTE, ABUSE, MISMANAGEMENT AND DANGERS TO PUBLIC HEALTH AND SAFETY.

I HAVE NOW BEEN SPECIAL COUNSEL FOR 11 MONTHS, SINCE SEPTEMBER 5, 1986. IN THAT PERIOD OF TIME, I HAVE HAD AN OPPORTUNITY TO BECOME FAMILIAR WITH THE HISTORY AND OPERATIONS OF THE OFFICE OF THE SPECIAL COUNSEL (OSC). I THINK THAT IT CAN FAIRLY BE SAID THAT THE OSC HAS BEEN SUBJECTED TO INTENSE SCRUTINY AND HAS BEEN EMBROILED IN CONTINUED CONTROVERSY DURING MOST OF ITS COMPARATIVELY SHORT LIFE AS AN AGENCY. IN ITS FIRST FOUR YEARS, FROM 1979-1982, THREE INDIVIDUALS SERVED AS SPECIAL COUNSEL, NONE SERVING LONGER THAN 17 MONTHS. BETWEEN 1979 AND 1985, THE GENERAL ACCOUNTING OFFICE (GAO) AUDITED THE OPERATIONS OF THE OSC NO LESS THAN 14 TIMES, CULMINATING IN THE 1985 REPORT ON ITS

INTENSIVE 18-MONTH REVIEW OF THE OSC'S HANDLING OF ALLEGATIONS OF REPRISAL FOR WHISTLEBLOWING. I HAVE SUCCEEDED TO THE POSITION OF SPECIAL COUNSEL FOLLOWING A PERIOD IN WHICH ENORMOUS STRIDES WERE MADE BY MY PREDECESSOR IN STABILIZING, MODERNIZING AND PROFESSIONALIZING THE OFFICE, AND IN ACHIEVING LITIGATIVE SUCCESSES IN PROHIBITED PERSONNEL PRACTICE CASES FOR THE FIRST TIME IN THE OFFICE'S HISTORY. I HAVE ALSO SUCCEEDED TO THE POSITION IN A PERIOD OF SOME OF THE MOST INTENSE CONTROVERSY THE OFFICE HAS KNOWN.

THAT IS BOTH POSITIVE AND NEGATIVE. IT IS POSITIVE IN THE SENSE THAT THE RESULTING DEBATE MAY GIVE RISE TO CONSTRUCTIVE PROPOSALS THAT WILL ENHANCE PROTECTION FOR GENUINE WHISTLEBLOWERS. IT IS NEGATIVE IN THE SENSE THAT MUCH OF THE CRITICISM OF THE OSC IN THE PRESENT CONTROVERSY IS DATED, MISINFORMED, OR OUTRIGHT MISLEADING, AND SIMPLISTIC IN ITS DEFINITION OF SOME OF THE QUESTIONS IN ISSUE. THE UNFORTUNATE RESULT, JUDGING BY FEEDBACK FROM SOME FEDERAL EMPLOYEES AND MOST PRESS COVERAGE ON THE ISSUE, IS THAT FEDERAL EMPLOYEES ARE RECEIVING A DISTORTED AND NEGATIVE PICTURE OF WHISTLEBLOWING, THE CONSEQUENCES OF WHISTLEBLOWING, AND THE OSC'S ROLE IN THE PROTECTION OF EMPLOYEE RIGHTS TO ENGAGE IN WHISTLEBLOWING.

IN USING THE PHRASE "PROTECTION OF EMPLOYEE

RIGHTS," I WANT TO MAKE THE FIRST OF SEVERAL POINTS THAT I WILL BE DISCUSSING THIS MORNING--THAT IS, THE OSC UNDER MY STEWARDSHIP HAS BEEN AND WILL CONTINUE TO BE STRONGLY COMMITTED TO THE MERIT SYSTEM PRINCIPLE THAT EMPLOYEES SHOULD BE PROTECTED AGAINST REPRISALS FOR DISCLOSURES OF VIOLATIONS OF LAW, MISMANAGEMENT, WASTE, ABUSE OR DANGERS TO PUBLIC HEALTH AND SAFETY, THROUGH VIGOROUS PURSUIT OF: 1) CORRECTIVE ACTION ON BEHALF OF INDIVIDUAL EMPLOYEES SUFFERING FROM A REPRISAL, UP TO AND INCLUDING LITIGATION AS NECESSARY TO OBTAIN SUCH ACTION, AND 2) DISCIPLINARY ACTION AGAINST OFFICIALS WHO TAKE SUCH REPRISALS. I SHOULD ADD THAT THIS COMMITMENT EXTENDS NOT ONLY TO WHISTLEBLOWERS, BUT TO ANY EMPLOYEE WHO CAN BE SHOWN TO HAVE BEEN THE VICTIM OF A PROHIBITED PERSONNEL PRACTICE.

AS EVIDENCE OF THIS CONTINUING COMMITMENT, I AM PLEASED TO REPORT TODAY THAT WITHIN THE FIRST 11 MONTHS OF MY TENURE, THE OSC HAS SUCCESSFULLY SECURED MORE CORRECTIVE ACTIONS IN MORE CASES (25) AND ON BEHALF OF MORE FEDERAL EMPLOYEES (AT LEAST 29) THAN IN ANY ONE YEAR SINCE AT LEAST 1981. OF THOSE 29 EMPLOYEES, THE OSC HAS INITIATED EFFORTS TO OBTAIN CORRECTIVE ACTIONS ON BEHALF OF NINE WHISTLEBLOWERS TO DATE. WE HAVE WON SUCH RELIEF IN SIX OF THOSE CASES, WITH THREE CASES PENDING. TWO OF THOSE THREE CASES ARE EXPECTED TO BE RESOLVED WITH CORRECTIVE ACTION FOR THE WHISTLEBLOWERS

IN THE VERY NEAR FUTURE. THE RELIEF THAT WE HAVE OBTAINED SO FAR RANGES FROM CANCELLATION OF REMOVALS AND A POSITION ABOLISHMENT, REINSTATEMENT, WITHDRAWAL OF A GEOGRAPHIC REASSIGNMENT, RETROACTIVE PROMOTION, RESCISSION OF A REPRIMAND, BACK PAY AMOUNTING TO TENS OF THOUSANDS OF DOLLARS, AND EXPUNCTION OF ADVERSE INFORMATION IN EMPLOYEE PERSONNEL RECORDS.

I WANT TO TAKE SOME TIME TO DISCUSS THE SIX INDIVIDUALS FOR WHOM WE HAVE OBTAINED RELIEF WITH YOU. APART FROM THE SATISFACTION WE TAKE IN HAVING BEEN ABLE TO ASSIST THEM, I THINK IT IS IMPORTANT TO HIGHLIGHT THEIR CASES TO TEMPER THE PUBLIC IMAGE OF WHISTLEBLOWERS FOSTERED IN SOME QUARTERS AS THE ULTIMATE AND INEVITABLE LOSER IN BOTH THE PUBLIC AND PRIVATE SECTOR WORKPLACE.

WHISTLEBLOWER NO. 1

WHISTLEBLOWER NO. 1, A SOCIAL WORKER EMPLOYED AT AT A VETERANS ADMINISTRATION (VA) OUTREACH CENTER, FILED A COMPLAINT WITH THE OSC ALLEGING THAT HE HAD BEEN TERMINATED FROM HIS POSITION IN REPRISAL FOR DISCLOSURES OF WHAT HE BELIEVED TO BE MISMANAGEMENT, ABUSE OF AUTHORITY AND GROSS WASTE OF FUNDS BY HIS SUPERVISOR. THE COMPLAINANT HAD DISCLOSED TO AGENCY OFFICIALS ON SEVERAL OCCASIONS THAT HIS SUPERVISOR

VERBALLY ABUSED AND PHYSICALLY INTIMIDATED STAFF MEMBERS, USED ONE OF THE CENTER'S OFFICIAL VEHICLES FOR HIS PERSONAL USE, REQUIRED STAFF MEMBERS TO PERFORM PERSONAL ERRANDS FOR HIM, ACCEPTED A GIFT FROM A CONTRACTOR, AND TREATED HIS PRIVATE PATIENTS AT THE VETERANS CENTER DURING OFFICIAL DUTY HOURS. THE COMPLAINANT HAD ALSO REPORTED THAT THE SUPERVISOR'S MISMANAGEMENT RESULTED IN THE DISRUPTION OF SERVICES TO THE VIETNAM VETERAN CLIENTS OF THE CENTER. AN OFFICIAL TO WHOM THE COMPLAINANT MADE HIS DISCLOSURES DURING A SITE VISIT CONFIRMED MORALE PROBLEMS AND LACK OF STAFF COHESION ATTRIBUTABLE TO MISMANAGEMENT AT THE CENTER. THESE FINDINGS LATER LED TO THE SUPERVISOR'S REMOVAL, BUT NOT BEFORE HE DISMISSED THE COMPLAINANT, CITING POOR PERFORMANCE.

THE OSC INVESTIGATED AND FOUND THAT THE REASONS CITED FOR THE COMPLAINANT'S TERMINATION WERE SPECIOUS AND UNSUPPORTABLE, THAT THERE WAS AN EVIDENT ANIMUS BY THE SUPERVISOR TOWARD THE COMPLAINANT BECAUSE OF HIS DISCLOSURES, AND THAT THE AGENCY WOULD NOT HAVE TERMINATED THE COMPLAINANT EXCEPT FOR HIS DISCLOSURES. ON MAY 12, 1987, I SENT A LETTER TO VA ADMINISTRATOR THOMAS K. TURNAGE, WHO THEREAFTER AGREED TO IMPLEMENT THE OSC'S RECOMMENDED CORRECTIVE ACTIONS, CONSISTING OF THE COMPLAINANT'S REINSTATEMENT WITH BACK PAY AND BENEFITS, AND EXPUNCTION OF THE RECORD OF HIS TERMINATION.

WHISTLEBLOWER NO. 2

WHISTLEBLOWER NO. 2 IS AN OSC COMPLAINANT WHO HAD BEEN DISMISSED FROM HER JOB AT A U.S. DEPARTMENT OF AGRICULTURE (USDA) LABORATORY DURING HER PROBATIONARY PERIOD, FOLLOWING HER SUBMISSION OF A LIST OF SAFETY CONCERNS TO A LABORATORY SAFETY COMMITTEE. THOSE CONCERNS DEALT WITH LABORATORY PROCEDURES AND PRACTICES, INCLUDING THE LABELLING AND CLEANING OF CONTAMINATED GLASSWARE, THE STORAGE OF COMBUSTIBLE GASES, THE DISPOSAL OF CHEMICAL WASTES, THE POTENTIAL FOR CHEMICAL LEAKAGE, LACK OF STORAGE SPACE, OVERCROWDED WORK AREAS, THE MISUSE OF EQUIPMENT, DISREGARD FOR SAFETY APPAREL AND INSUFFICIENT MONITORING OF RADIOACTIVITY LEVELS. THE COMPLAINANT'S CONCERNS WERE REGARDED AS CRITICISMS OF THE LABORATORY'S MANAGEMENT AND LED TO HER TERMINATION.

IN JANUARY OF THIS YEAR, I SENT A LETTER TO USDA SECRETARY RICHARD E. LYNG, OUTLINING OUR CONCLUSION THAT THE COMPLAINANT HAD SUFFERED A REPRISAL FOR HER DISCLOSURES. PURSUANT TO THAT LETTER, THE SECRETARY AGREED TO MY REQUEST FOR CORRECTIVE ACTION, CONSISTING OF BACK PAY AND EXPUNCTION OF THE COMPLAINANT'S RECORDS (THE COMPLAINANT DID NOT SEEK REINSTATEMENT AS SHE HAD FOUND NEW EMPLOYMENT IN THE PRIVATE SECTOR).

Whistleblower No. 3 (Anastasia Miragias)

Anastasia Miragias is an employee in the Boston Regional Office of the Department of Housing and Urban Development (HUD). She asked for the OSC's assistance in connection with what she believed to be a reprisal for her cooperation in an official Office of Inspector General (OIG) investigation, in which she had responded to investigators' questions about her knowledge of contacts between the Regional Administrator, John C. Mongan, and a former HUD employee during the OIG's inquiry into possible improprieties in a HUD grant award. Following the OIG interview, Regional Administrator Mongan refused to approve a request for her promotion, based upon the rationale that she could not be trusted with sensitive information.

The OSC's investigation disproved an additional rationale advanced by Mongan for the denial of her promotion--i.e., a concern about "grade bulge"--and led to the initiation of disciplinary action against him for reprisal against Ms. Miragias. The Merit Systems Protection Board (MSPB) found that Mongan had refused to approve Miragias' promotion as a reprisal for her protected disclosures to the OIG, and ordered him suspended without pay for 60 days.

Although Ms. Miragias received her promotion after the OSC began its investigation of her complaint, I sent a letter to HUD Secretary Samuel Pierce, Jr., in May of this year. I asked him to take further corrective action to restore Ms. Miragias to the position she would have been in had the reprisal not occurred, by making her promotion retroactive to March 1985, the approximate date on which the promotion was first denied, and to give her back pay to the same date. The Department agreed to take all of the actions requested.

WHISTLEBLOWER NO. 4 (WILLIAM GRIFFIN)

William Griffin, Regional Commissioner of the U.S. Customs Service Northeast Region, came to the OSC when he was about to be removed from his position, an action alleged to have been initiated because he had made protected disclosures to Secretary of the Treasury James A. Baker, III. On April 15, 1986, Mr. Griffin had written a letter to the Secretary complaining of mismanagement by a Customs official, including the promotions of unqualified or minimally qualified employees to key management positions. Shortly after the official received a copy of Mr. Griffin's letter and learned of an ensuing investigation by the Inspector General of the Department of the Treasury, he notified Griffin of his removal.

The OSC determined that there were reasonable grounds to believe that Mr. Griffin's removal was in reprisal for whistleblowing. Accordingly, OSC asked for and obtained a stay of his removal from the MSPB. Later, I formally requested the Secretary of the Treasury to reinstate Mr. Griffin to his position, and to ensure that no further personnel actions be taken against him in reprisal for his protected disclosures. As a result of that request, Mr. Griffin's removal was cancelled and he was reinstated as Regional Commissioner, where he continued to serve until the expiration of his appointment in May of this year.

Whistleblower No. 5

Whistleblower No. 5 is an OSC complainant who disclosed accounting irregularities in the military club system at an overseas post to investigators from the Department of the Army. The complainant alleged that, in reprisal for those disclosures, he had been reprimanded, notified that his position would be abolished, and detailed to a set of unclassified duties. Pursuant to his grievance, the local commander rescinded the reprimand, but informed him that his job might still be abolished pursuant to a pending reorganization. In early December, the complainant's job was abolished and he was informed that he would be returned

TO THE UNITED STATES AS SOON AS POSSIBLE, WHERE NO POSITION EXISTED FOR HIM TO WHICH HE COULD RETURN. THE OSC REQUESTED THAT THE ARMY ENSURE THAT THE COMPLAINANT BE PERMITTED TO REMAIN AT THE OVERSEAS POST UNTIL THE SCHEDULED END OF HIS TOUR, AND THAT HE RECEIVE JOB RETENTION RIGHTS DUE HIM. THE DEPARTMENT OF THE ARMY ACCEDED TO OUR REQUEST.

WHISTLEBLOWER NO. 6

WHISTLEBLOWER NO. 6 IS A BUREAU OF PRISONS EMPLOYEE WHO WROTE A MEMORANDUM DISCLOSING THE UNSAFE CONDITION OF A GOVERNMENT VEHICLE. TWO DAYS LATER, HE WAS SUMMARILY SENT ON AN UNWANTED 120-DAY DETAIL. THE EMPLOYEE COMPLAINED ABOUT THE DETAIL AND MADE OTHER ALLEGATIONS OF MISMANAGEMENT. HE THEN RECEIVED A DIRECTED REASSIGNMENT.

THE OSC DETERMINED THAT THE DETAIL AND THE PROPOSED REASSIGNMENT HAD BEEN BASED UPON REPRISAL. AT THE OSC'S REQUEST, THE AGENCY CANCELLED THE REASSIGNMENT AND ISSUED A WRITTEN REPRIMAND TO THE RESPONSIBLE MANAGEMENT OFFICIAL.

* * *

IT IS IMPORTANT TO NOTE THAT THESE SIX PEOPLE, AND

THE OTHER THREE AWAITING CORRECTIVE ACTION BY THEIR AGENCIES, ARE NOT ALONE IN THEIR DISCLOSURES AND IN THEIR STATUS AS SUCCESSFUL WHISTLEBLOWERS. THE TERM "WHISTLEBLOWER," AS YOU KNOW, WAS NOT DEFINED IN THE CIVIL SERVICE REFORM ACT (CSRA); THE WORD DOES NOT EVEN APPEAR IN THE STATUTE (SOME HAVE EVEN SUGGESTED THAT THE EVOLUTION OF THAT TERM WAS UNFORTUNATE, ALTHOUGH NO SATISFACTORY ALTERNATIVE, TO MY KNOWLEDGE, HAS EMERGED TO TAKE ITS PLACE). BUT IT IS CLEAR THAT WHISTLEBLOWING ENCOMPASSES DISCLOSURES OF OF THE KIND DESCRIBED AT 5 U.S.C. SECTION 2302(8), WHETHER MADE TO ONE'S SUPERVISORS, TO AN OIG, THE OSC, THE FEDERAL BUREAU OF INVESTIGATION, THE GAO, THE PRESS, CONGRESS, OR ELSEWHERE. IT CAN BE A DISCLOSURE MADE AT AN EMPLOYEE'S OWN INITIATIVE, OR IN RESPONSE TO A REQUEST FOR INFORMATION BY PERSONS CONDUCTING AUDITS OR INVESTIGATIONS; IT CAN BE A DISCLOSURE MADE ANONYMOUSLY, OR CONFIDENTIALLY, OR ON THE RECORD. FROM MY OWN EXPERIENCE DURING THREE YEARS AS AN INSPECTOR GENERAL, I KNOW THAT SUCH INFORMATION IS RECEIVED FROM EMPLOYEES ON AN ONGOING BASIS THROUGH THESE AND OTHER MEANS.

A RECENT AND NOTEWORTHY EXAMPLE IS ALEXANDER JUAREZ, ONE OF TWO EMPLOYEE RECIPIENTS OF INSPECTOR GENERAL CASH AWARDS FOR COST SAVING DISCLOSURES, HIGHLIGHTED IN THE LATEST SEMIANNUAL REPORT OF THE HUD INSPECTOR GENERAL. MR. JUAREZ, WHO WAS RESPONSIBLE FOR REVIEWING INDEPENDENT public accountant (IPA) reports on public housing authorities, detected the failure of a public housing authority to fully disclose excess subsidies which should have been returned to HUD. While his responsibility encompassed only reviews of IPA reports sent to him by the OIG, Mr. Juarez extended his review of a Texas public housing authority and found that the accountant had not detected additional monies owed to HUD. Mr. Juarez reported this information to the Regional Inspector General for Audit, who confirmed his conclusion. Mr. Juarez went on to review another audit of the same housing authority and to identify additional excess subsidies owed to the Government. His disclosures contributed to the return of $748,000 by the authority to HUD. Disclosures of the kind made by Mr. Juarez are the lifeblood of the OIGs and other law enforcement offices, and of agencies engaged in the establishment and maintenance of the internal controls required by law against fraud, abuse and mismanagement.

Whistleblowing is an activity that takes place every day in the government, in numbers that can only be guessed at, but there are some helpful points of reference. For example, in Fiscal Year 1986, the statutory OIGs completed over 20,000 audits and investigations; GAO conducted 1,024 audits; in the same period, there were approximately 21,600 calls to the OIG

FRAUD HOTLINES, AND APPROXIMATELY 13,000 CALLS TO THE GAO HOTLINE. THESE NUMBERS DO NOT, OF COURSE, BEGIN TO ACCOUNT FOR THE UNTOLD THOUSANDS OF DISCLOSURES MADE WITHIN AGENCIES EACH YEAR DURING THE ORDINARY COURSE OF AGENCY OPERATIONS, NOR TO THE PRESS OR TO THE CONGRESS.

IN THE FIRST 10 MONTHS OF MY TERM AS SPECIAL COUNSEL, THE OSC RECEIVED 849 COMPLAINTS ALLEGING THE COMMISSION OF AT LEAST ONE OF THE 11 PROHIBITED PERSONNEL PRACTICES DEFINED BY LAW. OTHER THAN DISCRIMINATION, THE MOST FREQUENTLY ALLEGED PROHIBITED PERSONNEL PRACTICE, AND OUR HIGHEST PRIORITY, IS REPRISAL FOR WHISTLEBLOWING-- 176 COMPLAINTS, REPRESENTING 16% OF ALL COMPLAINTS RECEIVED IN THE FIRST 10 MONTHS. IN THE CONTINUING DIALOGUE ABOUT THE LAWS DESIGNED TO FOSTER WHISTLEBLOWING AND TO DETER REPRISALS, THE SURPRISING FACT MAY BE THAT SO FEW COMPLAINTS FOR WHISTLEBLOWING REPRISAL ARE MADE AT ALL.

ON THE AVERAGE, ONLY 250 COMPLAINTS HAVE BEEN BEEN RECEIVED EACH YEAR BY THE OSC SINCE 1979; THE OIGS HAVE CONFIRMED THAT THE OVERWHELMING MAJORITY OF ANY SUCH COMPLAINTS RECEIVED BY THEM ARE REFERRED TO US, SO THAT THEY ARE INCLUDED IN OUR CASELOAD. PRECISE FIGURES ARE UNAVAILABLE FOR THE FREQUENCY WITH WHICH REPRISAL HAS BEEN INVOKED AS A DEFENSE TO A PERSONNEL ACTION IN APPEALS TO THE MSPB, BUT FROM FISCAL YEARS 1979-1986, WE FIND CITATIONS TO ONLY 51 REPORTED CASES IN THE FEDERAL COURTS INVOLVING FIRST AMENDMENT SPEECH ISSUES IN RELATION TO PERSONNEL ACTIONS IN THE FEDERAL GOVERNMENT--THIS, IN A WORKFORCE OF 3.1 MILLION FEDERAL EMPLOYEES, MAKING UNTOLD THOUSANDS OF DISCLOSURES IN AUDITS AND INVESTIGATIONS, TO THE OIG AND GAO HOTLINES, TO THE PRESS, THE CONGRESS, THEIR SUPERVISORS, AND ELSEWHERE. WHETHER OR NOT THESE FIGURES INDICATE THAT REPRISALS FOR WHISTLEBLOWING ARE AN ENDEMIC PROBLEM OF MASSIVE PROPORTIONS, WARRANTING THE WHOLESALE REVISION OF THE REMEDIAL PROCESSES FOR EMPLOYEES ALLEGING THE COMMISSION OF ANY PROHIBITED PERSONNEL PRACTICE IN RELATION TO ANY PERSONNEL ACTION IS, THEREFORE, A DEBATABLE PROPOSITION.

I HASTEN TO SAY AT THIS POINT THAT WHILE THE EXTENT OF REPRISALS FOR WHISTLEBLOWING MAY BE OPEN TO QUESTION, THERE CAN BE NO QUESTION BUT THAT ANY REPRISAL FOR WHISTLEBLOWING IS INTOLERABLE. THE OSC UNDER MY TENURE IS, AND WILL CONTINUE TO BE, SOLIDLY COMMITTED TO THE INVESTIGATION AND PROSECUTION OF MERITORIOUS WHISTLEBLOWER REPRISAL CASES. MY PRIORITIES FOR THE OSC ARE CLEAR, AND THEY ARE AS FOLLOWS:

1. ALLEGATIONS OF REPRISAL FOR WHISTLEBLOWING WILL BE TREATED AS OUR HIGHEST PRIORITY;

2. ALLEGATIONS OF REPRISAL FOR WHISTLEBLOWING WILL BE INTENSIVELY REVIEWED FOR ANY FEASIBLE ACTION, WHETHER BY MEANS OF STAYS, CORRECTIVE OR DISCIPLINARY ACTION;

3. OSC WILL USE EVERY OPPORTUNITY TO MAKE A PUBLIC RECORD OF AGGRESSIVE PURSUIT OF CORRECTIVE ACTION, BOTH TO ENCOURAGE OTHER WHISTLEBLOWERS, AND TO CORRECT THE LINGERING MISPERCEPTION IN SOME QUARTERS THAT THE OSC IS INTERESTED SOLELY IN THE PURSUIT OF DISCIPLINARY ACTION.

HOWEVER, AS THE GAO NOTED IN ITS 1985 REPORT ON THE OSC'S HANDLING OF REPRISAL ALLEGATIONS, THE ADEQUACY OF WHISTLEBLOWER PROTECTIONS SHOULD NOT BE VIEWED SOLELY BY REFERENCE TO CASES HANDLED BY THE OSC, SINCE RESPONSIBILITY FOR ESTABLISHMENT AND MAINTENANCE OF A CLIMATE IN WHICH WHISTLEBLOWING IS SUPPORTED, AND IN WHICH REPRISALS FOR WHISTLEBLOWING ARE NOT TOLERATED IS SHARED BY THE GOVERNMENT AS A WHOLE--INCLUDING THE PRESIDENT, THE CONGRESS, AGENCY HEADS, MANAGERS AND SUPERVISORS, APPELLATE SYSTEMS, AND THE INSPECTORS GENERAL.

SECTION 2302(c) OF THE CSRA, FOR EXAMPLE, MAKES THE HEAD OF EACH AGENCY RESPONSIBLE FOR THE PREVENTION OF PROHIBITED PERSONNEL PRACTICES, AND FOR COMPLIANCE

WITH AND ENFORCEMENT OF CIVIL SERVICE LAWS, RULES AND REGULATIONS. THE SAME RESPONSIBILITY DEVOLVES BY LAW ON FEDERAL SUPERVISORS EXERCISING DELEGATED PERSONNEL AUTHORITIES. THE INSPECTORS GENERAL SHARE A RESPONSIBILITY WITH US UNDER SECTION 7 OF THE INSPECTOR GENERAL ACT (AT 5 U.S.C. APP.) FOR THE PROTECTION OF EMPLOYEES IN THEIR AGENCIES WHO PROVIDE INFORMATION CONCERNING VIOLATIONS OF LAW, MISMANAGEMENT, WASTE, ABUSE OF AUTHORITY, OR DANGER TO PUBLIC HEALTH AND SAFETY. AGAIN, ACCORDING TO THE GAO, A COMPREHENSIVE EVALUATION OF THE SYSTEM OF WHISTLEBLOWER PROTECTIONS WOULD NEED TO TAKE INTO ACCOUNT THE ROLES PERFORMED BY THESE INSTITUTIONS IN THE PROTECTION OF WHISTLEBLOWERS.

AS FOR THE OSC, WE OPERATE AT ALL TIMES WITHIN THE FRAMEWORK OF THE LAW ENACTED IN 1978, AS INTERPRETED AND APPLIED BY THE MSPB AND THE COURTS. IT IS THE SAME LAW AND LEGAL FRAMEWORK THAT APPLIES TO CLAIMS OF REPRISAL RAISED BY EMPLOYEES IN APPEALS OF ADVERSE ACTIONS BEFORE THE MSPB, AND IN FIRST AMENDMENT CLAIMS BROUGHT IN THE FEDERAL COURTS, FOR WHICH REASON, WE HAVE SEEN NO PERSUASIVE EVIDENCE THAT THE OSC'S DISPOSITION OF ALLEGATIONS OF REPRISAL ARE SIGNIFICANTLY DIFFERENT THAN OUTCOMES ACHIEVED BY EMPLOYEES IN ANY OTHER FORA. I HAVE REFERRED SEVERAL TIMES TO THE INTENSIVE AUDIT OF THE OSC'S HANDLING AND DISPOSITION OF REPRISAL CLAIMS, WHICH WAS CONDUCTED BY THE GAO AT THE REQUEST OF

Representative Patricia Schroeder. Based upon its review of a sample of reprisal allegations contained in OSC case files closed over a two-year period, the GAO confirmed that the OSC's evaluation of and action upon reprisal allegations was reasonable, appropriate and in accordance with law, and that the complainants in its sample did not fall victim to lack of investigatory effort by the OSC.

S. 508 represents an effort to deal with the issues inherent in whistleblowing, and with other prohibited personnel practices, although, as I have indicated earlier, the dimensions of the perceived problem have yet to be satisfactorily defined. In many essential respects, S. 508 is patterned after H.R. 25, introduced by Representative Schroeder. In most respects in which it differs from H.R. 25, we find it preferable.

In particular, we believe that the absence in S. 508 of the representational relationship between the OSC and complainants to the office contained in H.R. 25 is a salutary one. Inasmuch as the problems with reconfiguration of the OSC as a legal services agency have already been discussed at length in hearings on whistleblower protection legislation last year, and again in hearings on H.R. 25 in March of this year, I will not repeat my thoughts on that subject in this

HEARING. AS I INDICATED EARLIER IN MY TESTIMONY TODAY, I HAVE NO DIFFICULTY WITH THE PREMISE THAT THE PROTECTION OF EMPLOYEES FROM PROHIBITED PERSONNEL PRACTICES IS AN ESSENTIAL ROLE OF THE OSC AND SHOULD BE A PRIMARY ROLE OF THE OFFICE, AS IT IS TODAY.

NEVERTHELESS, I HAVE ONE RESERVATION ABOUT S. 508'S DEFINITION OF THAT RESPONSIBILITY. I THINK IT IS IMPORTANT TO MAKE THE POINT THAT I SEE NO CONFLICT OR CONTRADICTION BETWEEN PROTECTION OF EMPLOYEE RIGHTS AND PROTECTION OF THE MERIT SYSTEM AS A WHOLE, THROUGH BOTH CORRECTIVE AND DISCIPLINARY ACTIONS. SO WHILE I SEE THE PROTECTION OF EMPLOYEES AS A PRIMARY MISSION OF THE OFFICE, I DO NOT THINK THAT THAT ROLE IS IN ANY WAY DIMINISHED BY THE PROTECTION OF THE MERIT SYSTEM AS A COORDINATE PRIMARY MISSION OF THE OFFICE. EACH AND EVERY CASE HANDLED BY MY OFFICE IS LOOKED AT FOR ANY FEASIBLE CORRECTIVE ACTION AND ANY POTENTIAL DISCIPLINARY ACTION--CONVERSELY, NEITHER REMEDY IS SOUGHT AT THE EXPENSE OF, OR TO THE EXCLUSION OF THE OTHER. THE PROTECTION OF EMPLOYEE RIGHTS AND THE MERIT SYSTEM ARE, AND OUGHT TO BE, MUTUALLY SUPPORTIVE, SUCH THAT I QUESTION THE NEED FOR DESIGNATION OF EITHER AS THE ONE AND ONLY "PRIMARY" MISSION OF THE OFFICE. I BELIEVE THAT A BALANCE CAN BE ACHIEVED AND IS BEING ACHIEVED BETWEEN THE TWO ROLES, BASED ON OUR SENSE THAT WHAT ADVANCES ONE BY DEFINITION ADVANCES THE OTHER.

THERE ARE OTHER, SIGNIFICANT CONCERNS ABOUT S. 508 THAT I WOULD LIKE TO DISCUSS, BEFORE PROCEEDING TO A DISCUSSION OF WAYS IN WHICH I BELIEVE THAT THE LAW UNDER WHICH THE OSC OPERATES CAN BE CHANGED TO ENHANCE PROTECTIONS FOR WHISTLEBLOWERS.

STANDARD OF PROOF. SECTIONS 1214(B)(4)(B) AND 1221(E) OF S. 508 PROVIDE THAT IN WHISTLEBLOWER REPRISAL CASES BROUGHT BY THE OSC OR AN EMPLOYEE, RESPECTIVELY, THE MSPB SHALL ORDER CORRECTIVE ACTION IF THE OSC OR THE EMPLOYEE SHOWS THAT A PROTECTED DISCLOSURE WAS A FACTOR IN A PERSONNEL ACTION AGAINST AN INDIVIDUAL, UNLESS AN AGENCY CAN SHOW THAT THE PERSONNEL ACTION WAS JUSTIFIED ON A BASIS OTHER THAN THE DISCLOSURE AND THAT THE ACTION WAS TAKEN SOLELY ON THAT INDEPENDENT BASIS.

THIS PROPOSED NEW STANDARD OF PROOF HAS BEEN REFERRED TO AS A NEW "ANY PART" TEST, AND REPRESENTS A DRAMATIC DEPARTURE FROM THE CURRENT TEST ENUNCIATED BY THE SUPREME COURT IN MT. HEALTHY V. DOYLE, AND USED BY THE MSPB AND THE COURTS IN SO-CALLED "DUAL MOTIVATION" CASES. IT ALMOST CERTAINLY CAN BE EXPECTED TO LEAD TO SOME APPRECIABLE INCREASE IN CASES WON BY OR ON BEHALF OF FEDERAL EMPLOYEES, SINCE ANY CONSIDERATION OF PROTECTED CONDUCT, NO MATTER HOW DE MINIMIS, BY ANY ONE AGENCY OFFICIAL INVOLVED IN THE TAKING, DIRECTION, RECOMMENDATION, OR APPROVAL OF A PERSONNEL ACTION, WOULD DEFEAT AN AGENCY'S CASE IN ITS

ENTIRETY--NOTWITHSTANDING THE MERITS OF ANY OTHER GROUNDS RELIED UPON BY AN AGENCY FOR BOTH MAJOR OR MINOR PERSONNEL ACTIONS.

THE MT. HEALTHY TEST REPRESENTED A CONSIDERED BALANCING BY THE SUPREME COURT AND BY THE MSPB (AND OTHER ADMINISTRATIVE FORA) IN DUAL MOTIVATION CASES OF THE NEED TO ASSURE THE PROTECTION OF IMPORTANT RIGHTS, AND THE NEED TO ASSURE THAT THE EXERCISE OF THOSE RIGHTS DOES NOT, IN AND OF ITSELF, IMMUNIZE EMPLOYEES FROM THE CONSEQUENCES OF NON-PROTECTED CONDUCT--MOST ESPECIALLY, CRIMES, OTHER MISCONDUCT OR EGREGIOUSLY POOR PERFORMANCE. THE TEST WAS ADOPTED IN FURTHERANCE OF CONGRESSIONAL INTENT AT THE TIME THE CSRA WAS ENACTED THAT EMPLOYEES NOT BE IMMUNIZED FROM THE CONSEQUENCES OF THEIR OWN INDEPENDENT MISCONDUCT AND UNSATISFACTORY PERFORMANCE. CRITICS OF THE MT. HEALTHY TEST, AND PROPONENTS OF THE "ANY PART" TEST HAVE NOT, TO THE BEST OF MY KNOWLEDGE, ADDRESSED THE DIFFICULT QUESTIONS POSED BY THE LATTER TEST. AMONG THESE ARE:

- DOES THIS "ANY PART" TEST REPRESENT AN ELEVATION OF WHISTLEBLOWING TO THE LEVEL OF THE ULTIMATE VALUE IN THE FEDERAL SERVICE, EXCEEDING THE VALUE OF DEALING EFFECTIVELY WITH CRIMES, MISCONDUCT AND UNSATISFACTORY PERFORMANCE--EXCEEDING, IN FACT, THE LONG-

STANDING SOCIETAL GOAL OF NON-DISCRIMINATION, CLAIMS OF WHICH ARE ADJUDICATED IN DUAL MOTIVATION CASES UNDER THE MT. HEALTHY STANDARD?

- WHAT WOULD BE THE EFFECT ON THE MORALE OF OTHER EMPLOYEES NOT ENGAGED IN MISCONDUCT OR UNSATISFACTORY PERFORMANCE IF PERSONS MAKING PROTECTED DISCLOSURES OF ANY KIND, HOWEVER DE MINIMIS, WERE TO BE PLACED IN A BETTER POSITION BY VIRTUE OF THEIR DISCLOSURES THAN THEY WOULD BE HAD THE DISCLOSURE NOT BEEN MADE?

- IN NEUTRALIZING THE CONSEQUENCES OF ANY MISCONDUCT OR POOR PERFORMANCE, WOULD THE ADOPTION OF AN "ANY PART" TEST HAVE ANY EFFECT ON THE GOAL OF DETERRENCE OF SUCH CONDUCT?

AS IS APPARENT FROM THE TESTIMONY TO BE PRESENTED BY THE DEPARTMENT OF JUSTICE AND THE OFFICE OF PERSONNEL MANAGEMENT TODAY, THE ADMINISTRATION IS NOT PREPARED TO ACCEPT WHAT IT BELIEVES WOULD BE A MAJOR REVERSAL OF THE POLICY CHOICES MADE BY THE CONGRESS IN 1978, AND IMPLEMENTED BY THE MSPB AND THE COURTS WITH THE ADOPTION OF THE MT. HEALTHY TEST.

INDIVIDUAL RIGHT OF ACTION. SECTION 1221 OF S. 508 PROPOSES THE CREATION OF AN INDIVIDUAL RIGHT OF ACTION BEFORE THE MSPB, WITH APPEAL RIGHTS TO THE FEDERAL COURTS FOR EMPLOYEES, FORMER EMPLOYEES AND APPLICANTS FOR EMPLOYMENT ALLEGING THE COMMISSION OF ANY PROHIBITED PERSONNEL PRACTICE IN CONNECTION WITH ANY COVERED PERSONNEL ACTION. THE NEW RIGHT OF ACTION WOULD ACCRUE TO CATEGORIES OF EMPLOYEES (E.G., RE-EMPLOYED ANNUITANTS AND PROBATIONERS), AND PERSONNEL ACTIONS (SO-CALLED "MINOR PERSONNEL ACTIONS--E.G., PROMOTIONS, REASSIGNMENTS, DETAILS AND TRAINING DECISIONS) FOR WHICH RECOURSE IS CURRENTLY PROVIDED TO THE OSC. THE BILL FURTHER PROVIDES, AT SECTION 1214(A)(3), THAT ANY SUCH ACTION MAY ONLY BE BROUGHT WITHIN 60 DAYS AFTER THE EMPLOYEE OR APPLICANT SEEKS CORRECTIVE ACTION FROM THE OSC AND IS ADVISED THAT INVESTIGATION HAS BEEN TERMINATED, OR THE EMPLOYEE OR APPLICANT IS NOT ADVISED BY THE OSC THAT IT WILL SEEK CORRECTIVE ACTION ON THE EMPLOYEE'S BEHALF. THE SCOPE OF THESE PROVISIONS FAR EXCEEDS THE SCOPE SUGGESTED BY THE TITLE OF THE BILL, WITH NO COMPELLING RATIONALE ADVANCED TO DATE, NOR ANY EVIDENCE THAT SIGNIFICANTLY DIFFERENT RESULTS WOULD BE OBTAINED FOR AGENCY EMPLOYEES THROUGH AN INDIVIDUAL RIGHT OF ACTION THAN CAN BE ACHIEVED UNDER CURRENT LAW (ASSUMING THE RETENTION OF THE MT. HEALTHY STANDARD).

THE IMPACT OF THIS BILL WOULD BE SEEN MOST DRAMATICALLY IN CONNECTION WITH DISCRIMINATION COMPLAINTS UNDER 5 U.S.C. SECTION 2302(B)(1). THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC) CURRENTLY HAS NO STAY AUTHORITY, NO MEANS BY WHICH TO ENFORCE ITS CORRECTIVE ACTION RECOMMENDATIONS, AND NO AUTHORITY TO SEEK DISCIPLINARY ACTION AGAINST EMPLOYEES FOUND TO HAVE ENGAGED IN DISCRIMINATION. DISCRIMINATION COMPLAINTS HISTORICALLY HAVE BEEN THE HIGHEST PERCENTAGE OF COMPLAINTS RECEIVED BY THE OSC. THE OSC'S POLICY OVER THE YEARS HAS BEEN GENERALLY TO DEFER DISCRIMINATION COMPLAINTS TO THE EEOC PROCESS (EXCEPT IN EGREGIOUS OR PRECEDENTIAL CASES, OR WHERE THERE ARE INDICATIONS THAT THE PROCESS IS NOT PROCEEDING REGULARLY). S. 508 WOULD GIVE RISE TO AN INDIVIDUAL RIGHT OF ACTION, REGARDLESS OF WHETHER A DEFERRAL POLICY CONTINUED TO BE FOLLOWED, SUCH THAT EMPLOYEES WOULD HAVE EVERY REASON TO FILE DISCRIMINATION COMPLAINTS WITH THE OSC IN ADDITION TO, OR IN LIEU OF, THE EEO CHANNEL. IN EITHER CASE, THE COSTS AND OTHER IMPLICATIONS OF A SUBSTANTIAL INCREASE ON OSC, MSPB AND FEDERAL COURT CASELOADS, AND THE MECHANICS OF PROCESSING A CASE IN WHICH BOTH CHANNELS ARE USED, NEED TO BE CONSIDERED--KEEPING IN MIND THAT IN FISCAL YEAR 1985, THE LAST YEAR FOR WHICH PUBLISHED FIGURES ARE AVAILABLE, A TOTAL OF 19,386 DISCRIMINATION COMPLAINTS WERE FILED BY FEDERAL EMPLOYEES USING THE EEO PROCESS.

Further, for those prohibited personnel practices predicated upon the taking of, or failure to take, a personnel action [(5 U.S.C. Section 2302(b)(8), (9), (11)], each and every decision to make, or not to make an appointment, to award or not to award a promotion, to approve or not to approve a training request, each and every performance evaluation, detail, transfer, reassignment, disciplinary action, and any other action whatsoever that could be construed as being inconsistent with an employee's grade or salary level, would carry with it the potential for time-consuming and costly litigation before the MSPB and in the federal courts--again, without any sound data to suggest that employees will benefit significantly, at least under current law (i.e., the Mt. Healthy test). For the eight other prohibited personnel practices based upon the taking of, or failure to take any action (not simply a personnel action) employees subject to any agency action would have recourse to the OSC as a vehicle for entry into the the MSPB and federal courts. Once again, I can only say that I have not seen any discussion to date of the need for such a major and wide-ranging increase in the potential for litigation before both the MSPB and the courts.

Assuming that such a remedy were to be confined to employees alleging a (b)(8) reprisal violation, it

WOULD REPRESENT A NEW OPPORTUNITY FOR ADJUDICATION OF A WHISTLEBLOWER CLAIM BEFORE THE MSPB AND IN THE FEDERAL COURTS--ALTHOUGH, AGAIN, WITHOUT ANY SOUND DATA TO SUGGEST THAT THE OUTCOME WILL BE ANY DIFFERENT THAN UNDER CURRENT LAW. IN THE EIGHT YEARS THAT THE OSC HAS BEEN IN EXISTENCE, THE OSC IS AWARE OF ONLY TWO CASES IN WHICH AN UNSUCCESSFUL COMPLAINANT TO THE OFFICE HAS PREVAILED ON THE MERITS IN LITIGATION IN ANOTHER FORUM.

IF, HOWEVER, THE CREATION OF AN INDIVIDUAL RIGHT OF ACTION FOR A CLAIM OF REPRISAL WERE TO BE ESTABLISHED BY THIS LEGISLATION, THERE IS ONE PRACTICAL PROBLEM WITH THE IMPLEMENTATION OF THAT PROCESS UNDER THE CURRENT PROPOSAL--I.E., MEANINGFUL ACTION WITHIN 60 DAYS IS HIGHLY UNLIKELY TO BE REALISTIC IN THOSE CASES IN WHICH A COLORABLE CLAIM OF REPRISAL FOR WHISTLEBLOWING IS RAISED. GIVEN OUR CURRENT CASELOAD, AND ANY POTENTIAL INCREASE UNDER ANY NEW LEGISLATION, A MORE REALISTIC PERIOD IS THE 180 DAYS ALLOTTED TO THE RESOLUTION OF COMPLAINTS IN THE EEOC PROCESS. IN THAT PERIOD OF TIME, WE WOULD BE FAR LIKELIER TO BE IN A POSITION TO ASCERTAIN THROUGH INITIAL PROCESSING AND AT LEAST SOME PRELIMINARY INVESTIGATION, WHETHER THE MATTER LOOKS SUFFICIENTLY PROMISING TO WARRANT FURTHER OSC ACTION. AT SUCH TIME, IF THE INVESTIGATION IS NOT COMPLETED, THE COMPLAINANT WOULD BE IN A BETTER POSITION TO MAKE A

MORE INFORMED DECISION BETWEEN ALLOWING THE OSC INVESTIGATION TO PROCEED (WITH ATTENDANT COST SAVINGS FOR THE COMPLAINANT IN HAVING INVESTIGATIVE AND LITIGATIVE COSTS ABSORBED BY THE OSC), AND RESORTING IMMEDIATELY TO THE INDIVIDUAL RIGHT OF ACTION.

JUDICIAL REVIEW. SECTION 4(B)(1) OF S. 508 WOULD AMEND 5 U.S.C. SECTION 7703 TO PERMIT EMPLOYEE APPEALS OF MSPB DECISIONS TO BE BROUGHT IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT OR ANY COURT OF APPEALS FOR THE CIRCUIT IN WHICH THE EMPLOYEE RESIDES, A PROVISION SUBSTANTIALLY SIMILAR TO EMPLOYEE APPEALS OF DISCIPLINARY ACTIONS INITIATED BY THE OSC PURSUANT TO 5 U.S.C. SECTION 1207(C). THIS AMENDMENT WOULD REVERSE ONE OF THE PRINCIPAL CHANGES WROUGHT IN THE FEDERAL COURT STRUCTURE BY THE FEDERAL COURTS IMPROVEMENT ACT OF 1982. IN MY VIEW, SUCH A REVERSAL WOULD BE UNWISE.

IT WOULD DISPERSE DECISION-MAKING IN THE FIELD OF FEDERAL PERSONNEL LAW AMONG THIRTEEN DIFFERENT CIRCUIT COURTS, DEFEATING THE FURTHERANCE OF A CONSISTENT BODY OF FEDERAL PERSONNEL LAW TO GUIDE NOT ONLY MANAGERS, BUT ALSO EMPLOYEES, THROUGHOUT THE FEDERAL GOVERNMENT. THE INEVITABLE CONFLICTS BETWEEN DECISIONS ARRIVED AT BY 13 SEPARATE COURTS OF APPEAL, REQUIRING RESOLUTION BY THE SUPREME COURT, WILL ONLY FURTHER DELAY THE DEVELOPMENT OF A UNIFIED BODY OF LAW IN THIS IMPORTANT AREA.

Federal personnel law is developed and implemented on a Government-wide basis throughout the country and around the world wherever U.S. Government facilities are located. I can think of few areas of the law as uniquely suited to development by one Court equipped to fashion a consistent, unified and coherent body of law.

Further, there is little reason to believe that whistleblower protection would be enhanced by recourse to the various circuits--it was, after all, two courts of appeal other than the Federal Circuit that decided Harvey v. MSPB (importing a new element--i.e., an intent to "thwart" or "punish" an employee--into the definition of "reprisal", defeating the OSC case against a manager charged with reprisal against an employee for his appeal to the OSC), and Starrett v. Special Counsel (reversing an MSPB finding of reprisal against a whistleblower). For both of these reasons, I suggest not only that review of employee appeals of MSPB decisions pursuant to 5 U.S.C. Section 7703 be maintained in the Federal Circuit, but that employee appeals from OSC disciplinary action cases pursuant to 5 U.S.C. Section 1207(c) be conformed to Section 7703 as well.

Informal Referrals. Section 1213(h) of S. 508 would prohibit the OSC from transmitting disclosures of

ALLEGED VIOLATIONS OF LAW, MISMANAGEMENT, WASTE, ABUSE OR DANGERS TO PUBLIC HEALTH OR SAFETY TO FEDERAL AGENCIES, EXCEPT THROUGH THE FORMAL REFERRAL PROCESSES ESTABLISHED IN THE CURRENT LAW (AT 5 U.S.C. SECTION 1206(B)). WE CAN ONLY SURMISE THAT THIS PROHIBITION ARISES FROM A BELIEF THAT AGENCIES WILL SEEK OUT THE SOURCES OF INFORMATION TRANSMITTED THROUGH THIS INFORMAL PROCESS AND TAKE A REPRISAL AGAINST THEM. THIS IS ENTIRELY INCONSISTENT WITH OUR EXPERIENCE.

THE OSC HAS MADE BETWEEN 200-300 INFORMAL REFERRALS TO THE AGENCIES SINCE 1979. THESE CASES CONSIST OF REFERRALS BY SOURCES WHO ARE ANONYMOUS, OR WHO ARE NOT COVERED PERSONS UNDER THE STATUTE (I.E., THEY ARE NOT FEDERAL EMPLOYEES). NO PERSON'S NAME IS USED IN ANY REFERRAL WITHOUT THEIR CONSENT. EACH INFORMAL REFERRAL IS MADE TO A STATUTORY OIG OR EQUIVALENT UNIT IN THE RECEIVING AGENCY. DISCLOSURES TO THE OSC THAT ARE NOT COMPREHENSIBLE OR THAT ARE CLEARLY DE MINIMIS ARE NOT REFERRED ANYWHERE.

MY OFFICE IS AWARE OF NO CASE IN WHICH AN AGENCY TOOK OR ATTEMPTED TO TAKE ACTION AGAINST ANYONE AS A REPRISAL FOR INFORMATION CONTAINED IN AN INFORMAL REFERRAL. THIS FEATURE OF THE BILL, IN MY VIEW, IS SIMPLY UNSUPPORTABLE BY ANY FACTS KNOWN TO US, AND WOULD FORECLOSE A USEFUL FORM OF COORDINATION AND

COOPERATION BETWEEN COORDINATE OFFICES RESPONSIBLE FOR ACTING UPON POTENTIALLY SIGNIFICANT DISCLOSURES OF POSSIBLE VIOLATIONS OF LAW, MISMANAGEMENT, WASTE, ABUSE AND DANGERS TO PUBLIC HEALTH AND SAFETY.

CRIMINAL REFERRALS. SECTION 1214(D) OF S. 508 WOULD REQUIRE THE OSC TO CONTINUE AN INVESTIGATION INTO AN ALLEGED PROHIBITED PERSONNEL PRACTICE AFTER REFERRAL OF ANY POSSIBLE CRIMINAL VIOLATION TO THE ATTORNEY GENERAL. CURRENT LAW, AT 5 U.S.C. SECTION 1206(C)(2)(B), PERMITS THE OSC TO CONTINUE ITS INVESTIGATION, BUT ALLOWS FOR DISCRETION SHOULD THE OSC AND THE DEPARTMENT OF JUSTICE CONCUR THAT CONTINUATION OF THE OSC INVESTIGATION MIGHT COMPROMISE A POTENTIAL CRIMINAL CASE. DEFERRAL OF ADMINISTRATIVE OR CIVIL INVESTIGATIONS TO A CRIMINAL INVESTIGATIVE PROCESS IS REASONABLE AND IN ACCORDANCE WITH INVESTIGATIVE POLICIES GOVERNMENT-WIDE, INCLUDING THE OIG COMMUNITY, AND SHOULD NOT BE PRECLUDED.

THESE ARE PROVISIONS OF S. 508 ABOUT WHICH I HAVE THE MOST SIGNIFICANT RESERVATIONS, ALTHOUGH IT IS HOPED THAT THESE AND OTHER RAMIFICATIONS OF THE BILL CAN BE DISCUSSED AND RESOLVED WITH YOU IN FURTHER DIALOGUE ABOUT THIS MEASURE. I WOULD LIKE TO BEGIN THAT DIALOGUE THIS MORNING BY SUGGESTING TWO OTHER AMENDMENTS THAT I BELIEVE WOULD ASSIST THE OSC IN PROVIDING SOME ADDITIONAL, OR EXPEDITED ASSISTANCE TO WHISTLEBLOWERS.

I BELIEVE THAT THE OSC SHOULD BE, AND BE PERCEIVED TO BE, PART OF THE SOLUTION TO ANY PROBLEM THAT MAY EXIST IN THIS AREA, AND NOT, AS SOME WOULD HAVE YOU AND OTHER FEDERAL EMPLOYEES BELIEVE--THE PROBLEM ITSELF. I BELIEVE THAT OUR RECORD, PARTICULARLY IN THE PAST 11 MONTHS, SPEAKS FOR OUR COMMITMENT TO THE VIGOROUS USE OF THE ALL THE TOOLS AVAILABLE TO US ON BEHALF OF WHISTLEBLOWERS WHEN THE FACTS OF EACH CASE SUPPORT THE BELIEF THAT A REPRISAL FOR WHISTLEBLOWING HAS OCCURRED, IS OCCURRING OR IS ABOUT TO OCCUR.

I WOULD BE LESS THAN HONEST, HOWEVER, IF I SAID THAT THERE ARE NO CHANGES THAT CAN BE MADE THAT WOULD ENHANCE OUR ABILITY TO PROTECT WHISTLEBLOWERS. I CAN RECOMMEND TWO SUCH CHANGES TO THE SUBCOMMITTEE TODAY. FIRST, 5 U.S.C. SECTION 2302(B)(8) COULD BE AMENDED TO EXTEND ADDITIONAL PROTECTION TO EMPLOYEES FOR THREATS TO TAKE OR NOT TO TAKE A REPRISAL FOR PROTECTED DISCLOSURES. THIS EXPANSION OF PROHIBITED ACTS IN REPRISAL WOULD BE CONSISTENT WITH A SIMILAR PROHIBITION AGAINST REPRISALS FOR THE MAKING OF PROTECTED DISCLOSURES FOUND IN SECTION 7 OF THE INSPECTOR GENERAL ACT OF 1978 (AT 5 U.S.C. APP.).

SECOND, IT HAS BEEN MY EXPERIENCE THAT MOST FEDERAL AGENCIES HAVE BEEN RESPONSIVE TO MY REQUESTS FOR STAYS AND CORRECTIVE ACTION, AS EVIDENCED BY OUR

PROGRESS TO DATE IN OBTAINING THOSE INTERIM AND FINAL ACTIONS ON A BROAD ARRAY OF FRONTS. NEVERTHELESS, I BELIEVE THAT OUR POSITION WOULD BE STRENGTHENED, AND TIMELIER RELIEF MADE MORE POSSIBLE WHEN NECESSARY, BY THE ADDITION OF DIRECT AUTHORITY TO ORDER STAYS AND CORRECTIVE ACTIONS WHENEVER WE HAVE GROUNDS TO BELIEVE THAT A REPRISAL HAS OCCURRED, IS OCCURRING OR IS ABOUT TO OCCUR, WITH PROVISION FOR APPEAL OF AN OSC ORDER BY AGENCIES IN APPROPRIATE CASES. ANY STAY AUTHORITY SHOULD BE OF SUFFICIENT DURATION AS TO PERMIT US TO PERFORM AT LEAST A BASIC INQUIRY INTO THE ESSENTIAL ELEMENTS OF A REPRISAL CASE.

I HOPE THAT THESE SUGGESTIONS ARE OF SOME ASSISTANCE IN THE CURRENT DIALOGUE ABOUT ANY ADDITIONAL WHISTLEBLOWER PROTECTIONS THAT MAY BE WARRANTED. I THANK THE SUBCOMMITTEE FOR ITS CONSIDERATION OF MY VIEWS, AND I WOULD BE PLEASED TO ANSWER ANY QUESTIONS AT THIS TIME.

17 Union Street
Peabody, MA 01960
July 9, 1987

Honorable Mary F. Wieseman
Special Counsel
Office of the Special Counsel
Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 1100
Washington, DC 20005

Dear Mrs. Wieseman:

This letter is to express my sincere appreciation to you and the Office of Special Counsel for the favorable conclusion of my complaint with final corrective action.

I wish to commend, in particular, two individuals on your staff, Attorney David Cortes and Investigator Paul Crovato, for their diligence, dedication and tireless efforts on my behalf. Their loyalty and dedication to duty is outstanding, and you should have a sense of real pride in their accomplishments.

I also wish to convey my personal thanks to these individuals for their high degree of professionalism and the competence displayed in their communications with me and other HUD staff members during the course of this legal action.

May all of your subsequent efforts on behalf of Federal employees victimized by prohibited personnel practices be as successful.

Sincerely,

Anastasia E. Miragias

ANASTASIA E. MIRAGIAS

PROFILE OF WHISTLEBLOWER WILLIAM J. GRIFFIN AND ASSISTANCE PROVIDED BY THE OFFICE OF SPECIAL COUNSEL

William J. Griffin sought the assistance of the Office of the Special Counsel (OSC) on June 6, 1986. At that time, he was the Regional Commissioner for the Northeast Region of the U.S. Customs Service, stationed in Boston, Massachusetts. Mr. Griffin alleged that senior officials of the U.S. Customs Service were engaging in a prohibited personnel practice by proposing to terminate his appointment as a reemployed annuitant following disclosures of mismanagement that he had made to the Secretary of the Department of the Treasury.

Based upon the OSC's preliminary assessment that there were reasonable grounds to believe that Mr. Griffin's allegations were true, OSC obtained successive stays of Mr. Griffin's removal pending completion of its investigation from the Merit Systems Protection Board. On October 21, 1986, based upon evidence obtained by OSC investigators during that investigation, Special Counsel Mary F. Wieseman sent a letter to Secretary of the Treasury James A. Baker III, reporting this Office's conclusion that Mr. Griffin's proposed removal from the Customs Service was the product of a prohibited personnel practice--specifically, reprisal for whistleblowing in violation of 5 U.S.C. § 2302(b)(8). For that reason, and pursuant to her authority at 5 U.S.C. § 1206(c)(1)(a), the Special Counsel requested that the Secretary take corrective action on Mr. Griffin's behalf. Specifically, the Special Counsel requested that Mr. Griffin's removal be cancelled and that no further personnel actions be proposed with respect to Mr. Griffin because of his protected conduct. The Special Counsel's letter noted that Mr. Griffin had expressed a desire to remain as Regional Commissioner at least through January 31, 1987, and that his appointment expired in May 1987.

On November 26, 1986, John J. Rogers, Assistant Secretary of the Treasury (Management), responding for Secretary Baker, agreed to implement the corrective action recommended by the Special Counsel. He advised that the Department would take no personnel action against Mr. Griffin based upon his disclosures, subject to the understanding that any personnel action involving Mr. Griffin, as a reemployed annuitant, after February 28, 1987, would be accorded the normal presumption of regularity. Notwithstanding the fact that the Treasury Department made no commitment regarding Mr. Griffin's tenure after February, he remained in his position until Saturday, May 9, at which time his appointment expired. The OSC was pleased to have been able to assist Mr. Griffin in remaining in his position at the Department following his disclosures of what he believed to be mismanagement in certain aspects of the Department's management activities.

Details on contacting Mr. Griffin for further information may be obtained from the OSC. Contact Ms. Laura M. Baumgaertner at (202) 653-7984.

July 13, 1987

Honorable Mary Weiseman, Special Counsel
The Office of the Special Counsel
U.S. Merit Systems Protection Board
1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

Dear Ms. Weiseman:

We are pleased to report that a favorable resolution has been reached in our complaint of age discrimination. The prompt and firm action taken by the Office of the Special Counsel was critical to achieving a withdrawal of the adverse action taken by our agency, the U.S. Geological Survey.

We especially commend the efforts of Patricia A. Stone, principal investigator in our case. Her professionalism and unrelenting effort to resolve this issue are worthy of the highest praise. During the course of the investigation we gained much confidence knowing that Ms. Stone was pursuing the case well beyond the scope of a normal 9 to 5 workday. Even when most of Washington, D.C. was snowbound, Ms. Stone continued her work, making her appointments with officials of our agency and working by telephone from her home when travel was not possible. There were times during the course of the investigation when knowledge that the Office of the Special Counsel was pursuing the case was our only source of optimism because all other avenues of recourse seemed to be of no avail. It was Ms. Stone's professional and tireless endeavor that inspired confidence in us and gave us hope when there was no hope left to sustain us. Ms. Stone exemplifies the very highest standards of Federal service.

The fine work accomplished by your office has restored our confidence at a time when honesty and integrity appear to be lacking in some Federal agencies and has demonstrated that protection of employee rights can be achieved.

Sincerely,

Joseph H. Hess
Joseph Hess

Paul E Felsheim
Paul E. Felshein

Kurt T. Gunard
Kurt T. Gunard

Charles Smith
Charles S. Smith

G.A. Payne

cc: Patricia A. Stone

DIGEST OF FEBRUARY 1985 OSC ANALYSIS OF MERIT SYSTEMS PROTECTION BOARD STUDY, "BLOWING THE WHISTLE IN THE FEDERAL GOVERNMENT" (1983)

What the Board found, although it is not stated in the text of the report, is that there was no meaningful change in the percentage of federal employees who expressed fear of reprisal compared to the number who claimed to have seen any wrongdoing or waste. In 1980, 13.9% of those who claimed to have seen wrongdoing (out of the total sample surveyed) said they did not report it out of fear of reprisal; in 1983, 19.2% (out of the total sample surveyed) made the same claim. [Percentages derived from raw, "unweighted" responses supplied by the Board.] Moreover, comparing the number of employees who expressed fear of reprisal to the total number surveyed suggests that fear of reprisal, in fact, dropped among employees as a whole. [Percentages derived from comparison of the total number of employees who responded in each year with those who expressed fear of reprisal in each year. In 1980, 8592 employees responded compared to 461 who expressed fear or 5.3% of the whole. In 1983, 4897 employees responded compared to 201 who expressed fear of reprisal or 4.1% of the whole.]

One important difference between the 1983 study and the 1980 study is that the Board's study found that 44% fewer employees in 1983 claimed to have witnessed any impropriety at all in government in 1983. A second significant difference between 1980 and 1983 was a sharp increase (29%) in the willingness of senior executives to engage in whistleblowing. In 1980, 39% of senior executives said they had engaged in whistleblowing; by 1983 the percentage had jumped to 68%. Although the sample numbers are small there is potential importance in this shift in perception, since senior executives are those most likely to detect serious corruption or waste and theoretically most vulnerable to reprisal in the form of reassignments and low performance appraisals. Fear of reprisal, if indeed it exists at all as a factor among these employees, did not affect their decisions to report wrongdoing.

The Board concentrated only on that percentage of the federal population who claimed to have direct knowledge of some wrongdoing and who subsequently chose not to report it. And the percentage who had had direct knowledge was much smaller in 1983. Furthermore, as the Board itself pointed out, there is a body of evidence that legislation is incapable of overcoming the residual fear of reprisal among employees.

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

1120 Vermont Avenue, N.W. Suite 1100
Washington, D.C. 20005

SYNOPSES
OF
COMPLETED AND PENDING
FORMAL AND INFORMAL CORRECTIVE ACTIONS,
STAYS, DISCIPLINARY AND OTHER ACTIONS*
RESULTING FROM OFFICE OF THE SPECIAL COUNSEL INITIATIVES
FROM 9/5/86 TO 7/25/87

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*Excluding Hatch Act matters.

SYNOPSES OF
COMPLETED AND PENDING FORMAL AND INFORMAL CORRECTIVE ACTIONS, STAYS, DISCIPLINARY AND OTHER ACTIONS RESULTING FROM OFFICE OF THE SPECIAL COUNSEL INITIATIVES
FROM 9/5/86 TO 7/25/87

CORRECTIVE ACTIONS

* (1) OSC File Number 16-7-00341 - On January 8, 1987, OSC sent a formal corrective action letter to the agency in a whistleblower reprisal case. The complainant (CP) had disclosed safety problems in an agency facility to an agency safety committee. The CP was fired during the probationary period because of this activity. On February 6, 1987, the agency agreed to corrective action including back pay and expunction of the CP's records.

* (2) OSC File Number 16-7-00066 - On June 27, 1986, OSC petitioned the MSPB to stay a removal action. Preliminary investigation by OSC had led to the determination that CP's removal was proposed because of disclosures of mismanagement which CP had made to the Secretary of the agency. At OSC's request, the Board continued the stay until December 9, 1986. On October 21, 1986, the Special Counsel sent a formal corrective action letter to the Secretary recommending cancellation of the removal action. On December 5, 1986, the Secretary agreed to this recommendation and cancelled the action.

* (3) OSC File Number 10-6-00413 - The CP, an employee of an agency component, alleged that a geographic reassignment was in reprisal for the CP's whistleblowing activities, i.e., a memorandum critical of health care services at an agency facility. OSC investigation substantially corroborated the CP's allegations and, on January 7, 1987, OSC submitted a report to the Assistant Administrator in charge of personnel administration. On July 8, 1987, the OSC sent a formal corrective action letter, and the agency has taken preliminary steps to implement corrective action.

* (4) OSC File Number 10-6-00355 - CP alleged that a reprimand and abolishment of position by the agency was in reprisal for protected disclosures. Informal contact with the agency resulted in the reprimand being rescinded, and the position abolishment being cancelled. Additional investigation of the subject agency officials is currently being conducted by the agency.

*Whistleblower cases denoted by asterisk

* (5) OSC File Number 10-6-01127 - CP alleged termination in reprisal for disclosures of mismanagement and other improprieties. Corrective action letter sent to agency head on May 12, 1987, recommending restoration, with back pay and benefits, and expunction of record pertaining to removal. The agency agreed to take the requested actions.

* (6) OSC File Number 10-6-00303 - CP alleged termination from position in reprisal for disclosures to agency officials of drug enforcement problems at job corps center and about personal relationship in that department. OSC is negotiating corrective action for the CP in connection with negotiations on a related disciplinary action (see Item 2 under Disciplinary Actions).

* (7) OSC File Number 10-7-00495 - During OSC investigation, agency agreed to withdraw geographic reassignment alleged to be in reprisal for reporting safety problems. OSC also authorized agency to initiate disciplinary action against supervisor who ordered reassignment in retaliation for protected disclosures; reprimand was issued on May 26, 1987.

* (8) OSC File Number 16-7-00785 - OSC filed a disciplinary action case on November 11, 1985, alleging that the denial of CP's promotion was a reprisal for disclosures made to the agency Inspector General. OSC prevailed before the Chief Administrative Law Judge on May 26, 1986, and the Board affirmed the Chief Administrative Law Judge's decision on April 17, 1987. The supervisor was suspended without pay for 60 days. On April 29, 1987, OSC wrote to the agency head, informing him of the above and recommending that the CP be given back pay for income lost from March through September 1985, as a result of the CP's delayed promotion. The agency agreed to take this requested action.

* (9) OSC File Number 10-6-00860 - CP, a recreation assistant at a military sports facility, filed a complaint with OSC alleging that CP's termination during probationary period was in reprisal for disclosures of mismanagement of the sports center and abuse by the CP's supervisor, in violation of 5 U.S.C. § 2302(b)(8). On June 25, 1987, OSC referred its Report of Investigation to the agency on an informal basis for consideration of corrective action, consisting of reinstatement, on behalf of the CP.

(10) OSC File Number 10-6-00145 - On February 18, 1987, OSC sent an informal request for corrective action to an

*Whistleblower cases denoted by asterisk

agency component. A suspension had been proposed, then withdrawn, for the CP's participation in failing to report violations of office procedure by another employee. OSC found CP was following what appeared to be lawful orders by the CP's supervisor, and asked that CP's official personnel file be reviewed to ensure that all references to the proposed suspension are expunged. Further OSC action is under consideration following the agency's decision not to implement the recommended action.

(11) OSC File Number 10-6-01106 - Companion case to 10-6-00145 (Item 10), the CP was a second employee suspended for failure to report actions being taken by a supervisor. The OSC asked the agency to rescind the suspension, restore the CP's salary for the period of suspension, and remove any record of the suspension from the CP's official personnel folder. Further OSC action is under consideration following the agency's decision not to implement the recommended action.

(12) OSC File Number 10-6-00538 - The CP alleged removal from the CP's position because of contacts made with union officials and an official at another agency concerning conditions of employment. The OSC investigation revealed evidence that the decision to terminate the CP, allegedly for poor performance, was not supported by the facts. OSC reported its findings to the agency on November 17, 1986, and the agency agreed to corrective action including rehiring and back pay.

(13) OSC File Number 10-6-00645 - CP had been on administrative leave (with pay) since February 1986, after CP's security clearance was suspended. CP alleged reprisal for whistleblowing. OSC discovered no evidence of reprisal for making protected disclosures, but did request the agency to correct the excessive administrative leave situation. At OSC's request, the agency returned CP to work in a nonsensitive position pending resolution of the security clearance problems. The agency also agreed to recommend new regulations concerning use of administrative leave in conjunction with security clearance issues.

(14) OSC File Number 10-6-00663 - The CP alleged an unlawful preferential hiring at an agency facility. OSC investigation found evidence that agency officials manipulated the hiring process. In October 1986, OSC's findings were forwarded to the agency and in January 1987, the agency agreed to take corrective action to regularize the appointment and to counsel the employees involved.

(15) OSC File Numbers 10-6-00704 and 705 - The CPs alleged sexual harassment at an agency facility. OSC's investigative findings were forwarded to the agency and on February 12, 1987, the agency requested and was granted [under 5 U.S.C. § 1206(f)] approval to remove the supervisor involved in the sexual harassment. The agency also reported that it was taking disciplinary action against an agency officer involved in the case. On July 6, 1987, the agency General Counsel advised OSC that, following a supplemental internal investigation, the agency was considering a lesser penalty. The OSC has withdrawn its approval of the agency's proposed action and is reviewing the matter for possible prosecution.

(16) OSC File Number 10-6-00765 - OSC received a complaint that several employees of an agency component received promotions as a reward for having provided sexual favors to their supervisors. Investigation revealed that several employees had engaged in sexual relations with their supervisors. It was also established that the employees who received promotions were qualified for their jobs. On October 19, 1986, the Assistant Secretary responsible for the agency component met with the OSC officials. As a result of this meeting, the agency instituted certain management changes to preclude further abuse of authority by managers. These changes included more supervisory controls over the employees implicated in the complaint.

(17) OSC File Number 10-6-01161 - On November 8, 1986, OSC contacted an agency component seeking informal corrective action and an administrative stay of the proposed removal of an employee, who had alleged reprisal for exercise of appeal rights, and discrimination on the basis of national origin and sex. The agency was informed that preliminary OSC investigation had uncovered evidence of reprisal for filing EEO grievances and OSC complaints, and also found evidence of discrimination in the form of racial and sexual epithets. The agency agreed to an informal 30-day stay of the removal, and on December 5, the agency issued a decision on the proposal removal favorable to the CP. The decision letter cancelled the removal proposal, and also cancelled a previous 7-day suspension and awarded back pay for that period.

(18) OSC File Number 10-6-01405 - The CP alleged agency denial of military leave in violation of law directly concerning merit system principles. OSC contacted the agency, which had been misapplying military leave procedures. New procedures were agreed to which would correct CP's use of military leave in the future. (The agency

was, however, correct in the denial of leave in one instance where CP did not have sufficient military leave balance for extended leave request).

(19) OSC File Number 10-7-00011 - CP alleged that the agency detailed CP out of CP's position for two years for accepting a detail to the agency EEO office. The discrimination allegation was deferred. CP also alleged that agency failed to document the various details over the two-year period. OSC contact with agency verified this latter complaint, and agency agreed to document the personnel actions, and send copies to the CP.

(20) OSC File Number 10-7-00058 - CP alleged that the agency proposed CP's termination in reprisal for filing a grievance, and that the CP's official personnel folder was not purged of all references to the proposed termination upon CP's resignation prior to the effective date of termination, as agreed to by the agency. OSC found no nexus between proposed termination and filing of grievance. However, OSC found that the official personnel folder had not been purged as the agency had agreed. OSC contacted the agency, which agreed to retrieve records from the records center and remove all references to proposed termination.

(21) OSC File Number 16-7-00161 - A formal corrective action letter was sent to an agency on November 10, 1986. That letter concluded that OPM violated 5 U.S.C. § 2302(b)(11) in that, in deciding the classification appeal of the CPs, the agency failed to conduct a position-to-position comparison of positions identified by CPs as being the same or similar but classified at a different level, before deciding the classification appeal of the CPs. OSC is negotiating corrective action with agency representatives.

(22) OSC File Number 10-7-00303 - The CP alleged that officials of an agency component arbitrarily and capriciously denied requests of information made pursuant to the Freedom of Information Act (FOIA). OSC contacted the agency's Office of General Counsel to inquire as to the reasons for the denial. Further discussion with that Office on January 16, 1987, resulted in a decision by the agency to comply with the CP's FOIA request.

(23) OSC File Number 10-7-00326 - Five employees of an agency complained to the OSC of intentional age discrimination, alleging only the eldest employees were geographically reassigned in a regional reduction-in-force, apparently for the purpose of inducing their retirement. The OSC investigation uncovered evidence contradicting

the testimony of the local agency managers. When the OSC presented this evidence to the agency, all five reassignments were rescinded. A disciplinary action decision by the agency is now pending. This synopsis represents five corrective actions.

(24) OSC File Number 10-7-00393 - CP's position abolished in January of 1987, due to reorganization of duties, responsibilities and staff. CP alleged partisan political affiliation discrimination. OSC found no evidence of political affiliation discrimination, but did find violations of SES RIF procedures when agency refused to create GS-15 position for CP as directed by OPM. OSC informally requested agency corrective action by withdrawal of proposed termination notice and establishment of GS-15 position. On April 1, 1987, agency agreed to cancel action and establish GS-15 position if OPM could not place CP in suitable SES position.

(25) OSC File Number 10-7-00582 - CP resigned on February 2, 1987; then attempted to withdraw the resignation on the same date. The CP notified the personnel office that CP was not resigning, and showed up for work the next day. Supervisor refused to allow CP to return to work. On April 9, 1987, agency agreed to OSC informal request for corrective action and withdrew CP's resignation, and granted pay and benefits for period of unjustified failure to permit CP's withdrawal of resignation.

(26) OSC File Number 10-7-00711 - CP received proposed removal, suspension, letters of reprimand, and an unsatisfactory performance appraisal, allegedly in reprisal for exercise of appeal rights. CP had grieved failure of agency to pay CP overtime and night differential pay for two years. CP won the grievance and received compensation for previous overtime. During the OSC investigation, the agency cancelled the removal action and one reprimand and agreed to grant a satisfactory performance appraisal. The OSC investigation continues.

(27) OSC File Number 16-7-00781 - In response to an employee complaint, OSC obtained documentation indicating that a manager repeatedly failed to submit timely performance standards and annual appraisals to subordinates. The Special Counsel reported these findings to the agency head and recommended that corrective action be taken to ensure that future delinquencies do not occur. The Special Counsel also asked the agency head to examine the impact of the manager's inaction, to determine whether priority considerations ought to be conferred to affected employees, including the CP. The agency agreed with

OSC's findings and implemented the recommended corrective action.

(28) OSC File Number 20-6-00027 - The CP, an employee of an agency facility, alleged that an official advocated the appointment of the official's relative for a position in violation of 5 U.S.C. § 2302(b)(7) (nepotism). Investigation by OSC revealed evidence supporting these allegations, as well as a violation of 5 C.F.R. § 310.103 (also pertaining to nepotism). On January 30, 1987, OSC referred this matter to the agency for administrative action. Additional inquiry by the agency led to a finding that impermissible advocacy did not occur.

(29) OSC File Number 20-6-00043 - The CP, an employee of an agency facility, alleged that an agency official engaged in various management abuses, such as nepotism. According to the CP, the official's spouse was hired for a position under the hiring official's authority. OSC contacted the agency and learned that the agency had initiated its own investigation. OSC requested that the agency keep the OSC informed. On October 24, 1986, the agency advised OSC that the official had been disciplined for conduct in violation of 5 U.S.C. § 3110 (suspension, later reduced to a letter of counseling). Also, the official's spouse was terminated from the position in question.

(30) OSC File Number 10-6-01480 - CP alleged that officials at the agency gave CP a 1986 performance rating of "Exceeds Fully Successful," instead of the "Outstanding" rating CP believed was deserved (with the accompanying performance award), in order to grant full performance awards to other employees in the "pool" who would be getting "Outstanding" ratings. On June 5, 1987, the OSC sent a corrective action letter to the agency head, informing him that a forced distribution of ratings, prohibited by 5 U.S.C. § 4302a(e) and 5 U.S.C. § 2302(b)(11), had occurred. OSC recommended correction of CP's 1986 performance appraisal to reflect an outstanding rating. OSC also recommended that CP be paid the difference between the amount of the performance award CP had received and the amount CP would have received had CP been rated "Outstanding". On July 9, 1987, the agency agreed to take the recommended corrective action.

(31) OSC File Number 16-7-01041 - CP, a probationary employee, sustained an on-the-job injury requiring CP to go on extended authorized sick leave. During the CP's absences, the Office of Worker Compensation Programs at the Department of Labor paid the CP's workers compensation under 5 U.S.C. Chapter 81. While not opposing CP's claim

of compensable work-related injury, the agency issued the CP a notice of discharge because of the CP's absences. CP thereafter notified the agency of CP's recovery and repeatedly requested restoration rights under 5 U.S.C. § 8151(b)(1). However, the agency made no effort to restore CP, to notify CP of any reason for refusing the requests, or to notify CP of CP's right to appeal to the Merit Systems Protection Board under 5 C.F.R. § 353.308. In a June 18, 1987, corrective action letter, OSC informed the agency that its failure to notify CP of the appeal rights was a violation of § 353.308 and also a prohibited personnel practice under 5 U.S.C. § 2302(b)(11). OSC, therefore, recommended that the agency reinstate CP, retroactively place CP in a leave without pay status from March 24, 1986, and award CP back pay from the time CP was available to return to work and was no longer receiving workers compensation. By letter dated July 22, 1987, the agency agreed to take the recommended corrective actions.

(32) OSC File Number 10-7-00803 - CP alleged that CP had been improperly placed on administrative leave and was about to be improperly demoted based upon agency findings from an Employee Attitude Survey. CP told OSC that the supervisory probationary period was completed and that CP had not been given an opportunity to improve the alleged deficient performance. On April 27, 1987, OSC contacted CP's supervisor to advise that the reported actions against CP appeared not to comply with applicable law regarding performance-based actions, and recommended that he contact the personnel office for guidance. On April 29, 1987, the agency personnel office contacted OSC to advise that no action would be taken against CP. On May 13, 1987, the OSC was advised that CP was being sent for a managerial training course and that upon return, would be restored to supervisory duties.

STAY REQUESTS

* (1) OSC File Number 16-7-00469 - On February 17, 1987, OSC filed a stay petition with the MSPB seeking a stay of the proposed separation of the CP. The CP had reported irregularities in certain medical and surgical procedures through the CP's chain of command at an agency facility, and to the OSC. The allegations were referred to the agency for an investigation. The 15-day (a) stay went into effect by operation of law when no Board member ruled upon it within three days of the petition. Based upon additional information that a further stay would not be necessary, as the CP's employment status would not be

*Whistleblower cases denoted by asterisk

adversely affected by the lack of a stay, OSC determined not to seek an extension when the stay expired. Alleged reprisals against the CP are currently under legal review by the Prosecution Division.

* (2) OSC File Number 10-7-00495 - On March 18, 1987, agency agreed to informal stay of geographic reassignment. See corrective action synopsis No. 7.

(3) See corrective action synopsis No. 17.

(4) OSC File Number 10-6-01535 - On September 24, 1986, the CP alleged to OSC that a letter proposing removal from an agency component on grounds of inadequate performance, was in fact based upon the CP having assisted a co-worker in filing an EEO complaint. In January of 1987, the Special Counsel requested and received from the agency a 60-day administrative stay of the CP's removal. Later that same month, at an informal agency hearing attended by OSC, a three-member panel concluded that CP's performance did not warrant removal and cancelled the removal action.

(5) OSC File Number 10-7-00711 - On April 30, 1987, agency agreed to informal stay. See corrective action synopsis No. 29.

DISCIPLINARY ACTIONS

* (1) OSC File Number 10-6-00797 - In March 1985, CP, a former manager of a military Commissary, provided evidence of waste and mismanagement at the Commissary to the agency Office of Inspector General. CP received a letter of reprimand in March 1986 for allegedly not following proper procedures when CP made the disclosures. The CP filed a complaint with OSC alleging that the reprimand was in reprisal for CP's disclosures. Pursuant to the OSC's referral of its investigative findings, the agency officials responsible for reprimanding the CP were themselves reprimanded for failing to act upon CP's grievance of the reprimand (which had been withdrawn by the agency following receipt of a congressional letter during the OSC investigation).

* (2) Special Counsel v. McBride, HQ12068710010 - On April 22, 1987, the OSC filed a complaint for disciplinary action with the MSPB against Davis O. McBride, a program manager with the Department of Interior, Bureau of Reclamation (BOR), charging him with reprisal against an employee for disclosures evidencing mismanagement,

*Whistleblower cases denoted by asterisk

violation of agency rules or regulations, or a substantial or specific danger to the safety of students at a BOR training center. The complaint alleges that McBride discharged the employee from her temporary appointment as a reprisal for her transmittal of letters to her supervisors, the Department of Labor, the American Civil Liberties Union, and a local union about a drug investigation, and a relationship between McBride and a student at the center.

(3) Special Counsel v. James Heyel, HQ12068710003 - Following an investigation, the OSC filed a complaint for disciplinary action with the MSPB against James Heyel, an auditor employed by the Defense Contract Audit Agency. OSC's action was based on evidence indicating that Mr. Heyel committed a prohibited personnel practice and violated civil service rule and regulations in connection with his involvement in filling a competitive service vacancy. Specifically, Mr. Heyel was charged with exerting unlawful influence on an eligible job candidate to withdraw from competition, for the purpose of offering the position to another person who was not within reach for selection under the so-called "rule of three." A settlement agreement between the OSC and Heyel, providing for his payment of a $1,000 fine, is awaiting approval by the MSPB.

PETITIONS FOR REVIEW

(1) OSC File Number 10-7-00283 - CP alleged that the agency coerced CP on the basis of a handicapping condition. CP claimed that a management official threatened removal if CP did not report to work in spite of previously submitted medical documentation that CP was unable to perform the job. CP alleged that the agency refused to accept any additional medical statements or consider CP's request for further leave without pay and placed CP in an AWOL status. CP resigned rather than face removal for AWOL. CP appealed to the MSPB; in the meantime, OSC opened an investigation. MSPB dismissed CP's appeal for lack of jurisdiction on March 31, 1987. OSC filed a Petition for Review on May 1, 1987, based on a recent Court of Appeals decision dealing with the same issue, and believed by the OSC to warrant further review of CP's case by the MSPB.

OFFICE OF THE SPECIAL COUNSEL
U.S. Merit Systems Protection Board

The Special Counsel

1120 Vermont Avenue, N.W., Suite 1100
Washington, D.C. 20005

OCT 8 [illegible]

Honorable David Pryor
Chairman, Subcommittee on Federal
  Services, Post Office, and Civil Service
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

I am writing pursuant to your letter requesting my written response to five questions as follow-up to my testimony on July 31, 1987, before the Subcommittee on Federal Services, Post Office, and Civil Service, concerning S. 508, the "Whistleblower Protection Act of 1987." You will find my answers to your questions enclosed. I understand that these responses will be made part of the hearing record.

Also, pursuant to a conversation between Deputy Special Counsel Erin McDonnell and Ms. Kim Weaver of the Subcommittee staff, I request that the text of my additional or supplemental statement be accepted for inclusion in the hearing record. In this, as in the Subcommittee's reception of my testimony, I appreciate your consideration of my views.

Finally, as I said in my testimony, I look forward to a constructive and fruitful dialogue with the Subcommittee towards our shared goal of enhanced protection for government whistleblowers.

With respect,

Mary F. Wieseman

Mary F. Wieseman
Special Counsel

Enclosures

MFW:EM/smj

RESPONSES TO SUBCOMMITTEE QUESTIONS

1. On the July 20 NBC Nightly News, you were shown saying that between 2%-3% of the whistleblowers who come to OSC receive some assistance. Is that an accurate statement--only 2%-3% of the whistleblowers coming to your office will receive some help?

No. The reference to 2-3% was intended to be a rough estimate of the percentage of incoming complainants alleging reprisal for whistleblowing who, historically, have been found to qualify for protection as whistleblowers. Reliance on the number of incoming complaints alleging reprisal for whistleblowing as a gauge of the number of actual whistleblowers seeking assistance from the OSC is misleading, since the complainant's characterization of his or her complaint is not always accurate and key elements of such an offense may be missing (e.g., a statutorily-protected disclosure).

Further, as was made clear in the 1985 report by the General Accounting Office (GAO), there are various reasons why complainants alleging reprisal have not qualified for relief, including the most basic disqualifications that they did not make a disclosure, they did not make a disclosure of the kind intended by the statute (i.e., of a violation of a law, rule or regulation, mismanagement, waste of funds or abuse of authority, or danger to public health or safety), the personnel action taken was not within OSC jurisdiction, or responsible officials did not know of the employee's disclosure. Other reasons described in the report included considerations of the OSC's likelihood of prevailing on the merits of an employee's claim in light of the development of the law by the Merit Systems Protection Board (MSPB) and the courts.

It is far more accurate to say that the OSC helps all whistleblowers who qualify for help under the law as it has been written by the Congress and interpreted by the MSPB and the courts.

2. As I said in my opening statement it has become increasingly clear to me that somewhere, somehow, there has been of (sic) severe lapse in the protection provided to government whistleblowers. Your two immediate predecessors created an anti-whistleblower attitude which seems to have filtered down to OSC staff. Would you say that this stems from a failure of the system or a failure of personnel?

I can only address this question based upon my own experience with the OSC, and that is that I did not find an anti-whistleblower attitude among the OSC staff when I took office, and in the months since, the staff has proven to be totally supportive of the goals of protection of employees generally and of whistleblowers in particular, as well as the protection of the merit system as a whole. Evidence of this, assuming any is needed, can be found in the vigor with which the entire OSC staff--complaints examiners, investigators and attorneys alike--has responded to my goals and priorities in the past year by seeking to recognize and exploit opportunities for corrective action on behalf of federal employees whenever possible, with the result that they have sought and obtained more corrective actions in the last year than in any year since at least 1981. My formal and opening statements discuss their efforts, particularly with respect to whistleblowers, in more detail.

Parenthetically, I would like to take this opportunity to respond to one historical matter raised by Senator Charles E. Grassley at the hearing, and that is the case of whistleblower George Spanton. One point that should not be overlooked in any discussion of Mr. Spanton's case is that it was through the efforts of the OSC that the MSPB granted two formal stays of his geographic reassignment by the Defense Contract Audit Agency (DCAA); further, at the request of the OSC, Secretary Weinberger took steps on at least two occasions to prevent Mr. Spanton's reassignment. On August 31, 1983, following receipt of a formal request by the then Special Counsel for corrective action on Mr. Spanton's behalf, the DCAA agreed to cancel his geographic reassignment and Mr. Spanton completed his tour of duty in Florida until his retirement.

The OSC aggressively prosecuted DCAA's Director and Deputy Director, its highest management officials, as well as both the Director and the Regional Audit Manager of the Atlanta DCAA office, charging all four officials with taking a reprisal against Mr. Spanton for engaging in protected conduct by refusing his request for waiver from rotation and ordering his geographic reassignment. After a month-long trial, the MSPB found that three of those officials, including the Director and the regional office directors, had engaged in reprisal for whistleblowing, but dismissed charges against the Deputy Director (including reprisal for Spanton's exercise of an appeal right). The MSPB defended the appeal brought by the DCAA Director in the Fourth Circuit Court of Appeals, and it was that court that reversed the Board's finding of reprisal by the head of DCAA; the remaining two cases were later dismissed by the Board in light of the Fourth Circuit decision.

The OSC shares Senator Grassley's disappointment that the Fourth Circuit Court of Appeals did not agree with both the OSC and the unanimous MSPB view of the evidence supporting the disciplinary action sought by the OSC against DCAA's Director. Nevertheless, I hope that this sense of disappointment does not obscure the equally significant outcome of that case--i.e., that the OSC succeeded in blocking Mr. Spanton's geographic reassignment, and through its intervention on his behalf, he was able to complete his tour of duty in Florida as he had sought to do from the beginning.

The issue that appears to remain in the question as it is posed--i.e., whether "the system" is responsible for a severe lapse in the protection provided to government whistleblowers--is a much more complex issue. As I suggested by reference to data included in my formal statement for the hearing, the extent to which any problem in the system of protection for whistleblowers can be said to be an endemic one of massive proportions is a debatable proposition. Nevertheless, such a perception persists, and should be addressed.

I said in an earlier response to questions from Representative Patricia Schroeder, after hearings on whistleblower protection legislation by her Subcommittee, that the OSC's historical experience with criticism of the system erected for whistleblower protection generally and the OSC in particular has been based in part on the tendency of disappointed complainants--and only disappointed complainants--to seek Congressional intervention. The level of their dissatisfaction is undoubtedly, and quite understandably, magnified by their very personal involvement in the facts of their cases. The consequence, all too often, is that overbroad generalizations have sometimes resulted from uncritical acceptance of their characterizations of events, without reference to all the facts, to the law governing their complaints, to GAO's findings and other relevant information. Perceptions about the work of the OSC have also been further distorted by misleading or outright erroneous claims made about the Office's efforts in particular cases and in general by one or more advocacy groups--for which reason, I was most appreciative of the time provided to me at the hearing to correct at least some of the more egregious mischaracterizations of the Office that had been made up to that point.

As I believe was evident from the two days of hearings, what was said about the system of whistleblower protection must be weighed in the balance with all available facts before proceeding to broad conclusions that the system as a whole, or any component thereof, has failed. I say this without intending in any way to minimize problems that do exist.

If I had to isolate a key, legitimate factor in the current debate over the adequacy of whistleblower protections, it would be this: the conflict between some of the expectations created with the enactment of the Civil Service Reform Act (CSRA), and the results since then of efforts by agencies, the MSPB and the courts to reconcile the demands of protecting whistleblowing for its own sake, and of dealing effectively with poor performance or misconduct--another key goal of the CSRA--when they are intertwined with whistleblowing. This, I am inclined to believe, is the most difficult systemic issue in the area of whistleblower protection.

3. Would it be an improvement in the statute and help you in your efforts to make the agency's burden in a "dual motivation" case proof by clear and convincing evidence?

I believe that legislative elevation of an agency's burden of proof in "dual motivation" whistleblower reprisal cases under 5 U.S.C. § 2302(b)(8), from proof of an independent, legitimate reason for action against an employee who has engaged in protected conduct by a preponderance of the evidence, to proof by clear and convincing evidence, would assist our efforts in at least some cases. Together with a legislative history more clearly enunciating Congress' intent for the guidance of the MSPB and the courts, it would send a clear signal that in the face of any evidence that an agency has considered an employee's protected disclosure in its efforts to take action against that employee, the agency's actions as a whole would have to be subjected to stricter scrutiny and be made to meet a more compelling test of need. It is not possible to predict with any certainty the numbers of whistleblower reprisal cases that would benefit from such an elevated standard, but I believe that at least some cases would be easier to resolve and to litigate, if necessary, if agencies were to be held to a higher burden of proof for actions taken against employees who have engaged in such protected conduct.

4. On page 28 of your testimony, you express concern about the D.C. Circuit Court of Appeals decision in the Harvey case, which added a new element to

the definition of the term "reprisal"--an intent to "punish" or "thwart" an employee. Does the Court's decision make it more difficult for you to establish that a reprisal had occurred? What would be (sic) help you overcome this new stumbling block?

The Court of Appeals' narrow definition of retaliation or reprisal, and the court's application of that standard to the facts of the Harvey case (Harvey v. Merit Systems Protection Board, 802 F.2d 537 (D.C. Cir. 1986)), portend difficulties in other reprisal cases--particularly where the facts are not as strong as they were in Harvey (found by an Administrative Law Judge and a unanimous MSPB panel to constitute reprisal for the exercise of protected conduct). There are several different ways in which the effect of that decision could be ameliorated. One way to do so would be to amend the language of 5 U.S.C. § 2302(b)(8) to delete the word "reprisal" and prohibit instead the taking or failing to take (or threatening to take or not to take) a personnel action with respect to employees or applicants for employment "based on" or "because of" the conduct described therein. With or without a change in the statutory language, a legislative history rejecting a narrow application of the Harvey language and making it clear that reprisal or retaliation is to be broadly construed to achieve the ends of the statute (i.e., to promote whistleblowing and to deter those who would retaliate against employees who engage in that conduct) would significantly aid our future efforts.

5. You suggest giving your office the authority to order stays and corrective action. Wouldn't you also like the authority to order disciplinary actions? MSPB's testimony states that if an employee gets the right to obtain a stay from them while waiting for an MSPB decision, their caseload would increase by 1400 cases--more than your annual caseload. Do you agree with their opinion?

I see disciplinary actions against individuals as being somewhat different from stays or corrective action orders against an agency, in that some degree of due process is required. On balance, I do not see the same benefits to be derived by empowering the Special Counsel to order disciplinary actions as I do by the authority to order stays and corrective actions.

Two possible alternative procedures for OSC-directed disciplinary actions suggest themselves: 1) either the Special Counsel could direct an agency to initiate formal disciplinary action under existing procedures, or 2) the

Special Counsel could order an agency to impose disciplinary action (in general or with a specified penalty), using some new and expedited process. In either case, I presume that employees would be given appeal rights to the MSPB for major adverse actions, and grievance rights for minor adverse actions.

One of the attractive features of OSC-ordered stays and corrective actions is that the leverage provided thereby should help to obtain timelier resolution of stay and corrective action requests. It is hard to predict whether and to what extent the same result would occur if the OSC had the authority to order disciplinary actions. I think that it is reasonable to assume that an employee would appeal a directed disciplinary action more often than an agency would appeal a stay or corrective action order. Assuming continuation of the current MSPB policy of attempting to dispose of employee appeals within 120 days, it is theoretically possible that disciplinary actions could be effected more quickly than is now the case with disciplinary action complaints filed by the OSC directly with the MSPB (pursuant to the Board's original jurisdiction provisions).

On the other hand, particularly under the first alternative described above, valuable flexibility would be lost by the OSC's lack of direct involvement in and control over the charging and/or appeal process, especially since S. 508 would not permit the OSC's intervention as a matter of right. In fact, it makes the OSC's intervention in a case before the MSPB conditional upon the employee's consent, hardly likely in an appeal by an employee of a Special Counsel-directed disciplinary action. Further, a situation could arise in which an agency disagrees with the OSC's directive, leading to half-hearted enforcement efforts and unpredictable results.

The OSC has encountered problems in the past with the outcome of litigation in disciplinary action cases brought by agencies against employees after the OSC's waiver under 5 U.S.C. § 1206(f) of its right to charge the employee directly. A notable example is the disciplinary action case brought by the U.S. Forest service against Robert E. Lynn. After an investigation, the OSC determined that Lynn and another Forest Service employee had terminated employee Istvan Toth in reprisal for having written a letter to an Alaska newspaper critical of Forest Service personnel recruitment policies and procedures. OSC's request for corrective action resulted in Toth's reinstatement with back pay and benefits. The Forest Service requested and was granted permission by OSC under § 1206(f) to suspend

Lynn for 30 days and Chiarella for 14 days. Lynn appealed his suspension to the MSPB. The presiding official found that Lynn had terminated Toth in reprisal for having engaged in protected free speech, but reduced his suspension to a reprimand, in part on the ground that he was not on notice of First Amendment free speech rights when he terminated Toth. The OSC petitioned the MSPB for review of that decision, but the petition was denied on procedural grounds.

Again, on balance, I do not believe that the advantages of OSC-directed disciplinary actions outweigh the disadvantages. There is no assurance that such authority would materially affect the time required to dispose of an adverse action, and the OSC could lose control over the litigation. For those reasons, I would not seek or advocate consideration of that authority at this time.

As to the second portion of the question regarding MSPB's caseload, based upon projections from the OSC's caseload during Fiscal Year (FY) '87, I believe that the MSPB's estimate is realistic and even conservative. Requests for stays were made in 110 matters to the OSC in FY '87--approximately 10% of all new matters received during that period.

S. 508 would give all federal employees alleging discrimination in violation of 5 U.S.C. § 2302(b)(1) the same right to seek a stay pursuant to the individual right of action as employees alleging any of the other 10 prohibited personnel practices. As I said in my formal statement, federal employees filed 19,386 discrimination complaints in FY '85, the last year for which published figures are available. Requests for stays in those matters at the rate of 10% would yield at least 1900 new matters before the MSPB in discrimination cases alone. This figure does not account for stays likely to be sought by complainants alleging other prohibited personnel practices who had exhausted the OSC as an avenue of relief, nor for stays sought by employees exercising existing appeal rights directly to the MSPB; finally, it does not account for new caseloads for both the OSC and the MSPB likely to be generated by the extension of coverage to employees of the Tennessee Valley Authority.

SUPPLEMENTAL STATEMENT OF
MARY F. WIESEMAN

ON

S. 508

"THE WHISTLEBLOWER PROTECTION ACT OF 1987"
July 31, 1987

Mr. Chairman, Member of the Subcommittee, and Senator Levin:

I want to thank the Subcommittee for the opportunity to address you today on the subject of whistleblower protection in general, and S. 508 in particular.

I have now been Special Counsel for almost 11 months, since September 5, 1986. In that period of time, I have had an opportunity to become familiar with the history and operations of the Office of the Special Counsel (OSC). For example, in its first four years, from 1979-1982, three individuals served as Special Counsel, none serving longer than 17 months. The General Accounting Office (GAO) chronicled the office's growing pains in no less than 14 audits between 1979 and 1985, culminating in the 1985 report on its intensive 18-month review of the OSC's handling of allegations of reprisal for whistleblowing. That report, as you know, supported the validity of the OSC's decision-making under current law in the handling of whistleblower reprisal allegations. Still, I have succeeded to the position in a period of some of the most intense controversy the office has known.

That is both positive and negative. It is positive in the sense that the resulting debate may give rise to constructive proposals that will enhance protection for genuine whistleblowers. It is negative in the sense that much of the criticism of the OSC in the present controversy is dated, misinformed, or outright misleading, and simplistic in its definition of some of the questions in issue--as evidenced by testimony at these hearings last week and this morning.

Nothing could be further from the truth as I know it in my nearly 11 months as Special Counsel than much of what has been said so far in these hearings. I must reject any notion that the OSC under my tenure must share a large part of the responsibility for any reluctance on the part of federal employees to disclose fraud, waste and abuse. I must also reject any characterization of the OSC under my tenure as an organization that just does not care.

Since I became the Special Counsel, the OSC has sought relief on behalf of nine federal employee whistleblowers, and in less than 10 months, we won relief for six of them--more, I daresay, than the Government Accountability Project (GAP) or any equivalent organization has in the same period of time. Further, in two of the three remaining cases sent to agencies for remedial action so far, I expect favorable results for the whistleblowers in the very near future.

The relief that we have already achieved since September ranges from cancellation of removals and a position abolishment, reinstatement, withdrawal of a geographic reassignment, retroactive promotion, recision of a reprimand, back pay amounting to tens of thousands of dollars, and expunction of adverse information in employee personnel records. I describe the six whistleblowers who have benefited from OSC's efforts under my tenure in more detail in my formal statement, and I commend their stories to your and the public's attention.

The Subcommittee and the public at large should also know that in the first 10 months of my term, the OSC initiated corrective actions in 32 cases, and we have won relief on behalf of at least 29 federal employees so far--significantly more actions than in any one year since at least 1981.

Despite what I believe to be an auspicious beginning to my term as Special Counsel, and the growing realization of my ambitions for the office, the OSC has been subjected--unfairly, in my view--to a continuing and escalating barrage of virulent, increasingly strident attacks on its commitment, its professionalism, and worst of all, its basic integrity. Broad-based attacks against the office about complaints dating back to 1980 continue to be made and applied uncritically to the OSC of today. Activities and statements by my predecessors continue to be used in characterizing the OSC of today. Orchestrated campaigns are waged to prejudge and publicly discredit our investigations before they are completed and the results are known. It is small wonder that employees are said to be apprehensive about coming forward.

For reasons that I cannot fully comprehend or accept, interested Congressional committees and the press (with the exception of the Federal Times) have refused our requests to speak with, and to provide complainants who have been helped by, the OSC with a forum akin to complainants who disagree when we must conclude that we are unable to obtain relief for them under the law. The hearings last week produced people who were willing to say the most extreme and negative things in an apparent attempt to do as much damage to our credibility as possible. As the GAO reported in 1985, part of the perceptual problems experienced by the Office result from the fact that the Congress and the press generally only hear from disappointed complainants who do not qualify for relief from the OSC. This is expected. But I must question the basic fairness of providing a forum for such individuals, to the exclusion of individuals who would dispute those negative assessments based upon their own first-hand experience with the OSC.

No one with this Subcommittee, to my knowledge, has spoken with Anastasia (Tess) Miragias, Whistleblower No. 3 in my formal statement. No one in the press (other than the Federal Times), has been willing to report the OSC's success in achieving corrective action for her, although protestations of innocence by the reprisor in her case were carried by newspapers in that area of the country, and possibly elsewhere. I want to take this opportunity to let Tess Miragias speak for the record of this hearing, so to speak, in the form of an unsolicited letter that she recently sent to me. She wrote:

> "This letter is to express my sincere appreciation to you and the Office of Special Counsel for the favorable conclusion of my complaint with final corrective action.
>
> I wish to commend, in particular, two individuals on your staff, Attorney David Cortes and Investigator Paul Crovato, for their diligence, dedication and tireless efforts on my behalf. Their loyalty and dedication to duty is outstanding, and you should have a sense to real pride in their accomplishments.
>
> I also wish to convey my personal thanks to these individuals for their high degree of professionalism and the competence displayed in their communications with me and other HUD staff members during the course of this legal action.

> May all of your subsequent efforts on behalf of Federal employees victimized by prohibited personnel practices be as successful.
>
> Sincerely,
>
> Anastasia E. Miragias"

I am providing a copy of this letter to the Subcommittee and I respectfully request that it be included in the record of these hearings.

No one with this Subcommittee or the press, to my knowledge, has responded to expressions of willingness to speak about his experiences with the OSC by former Regional Customs Commissioner William Griffin, Whistleblower No. 4 in my formal statement. A fuller profile of Mr. Griffin's case, and the assistance rendered to him by the OSC, in the form of stays and cancellation of his proposed termination by the Customs Service, is being provided to the Subcommittee. I request that it, too, be included in the hearing record.

I want to take this opportunity, too, to correct the record of last week's hearing about one of the investigators on the OSC staff, Patricia Stone. Joseph Whitson, one of the witnesses, described the OSC, including Ms. Stone, as a "false hope." There are five individuals in Minnesota today who refute that charge more eloquently than I could. These gentlemen came to our office after their geographical reassignments were ordered, based upon their belief that they had been targeted for reassignment based upon their age. Ms. Stone's investigation disclosed significant discrepancies in the rationale offered by the responsible agency manager, and led to the agency's recent decision to cancel all five reassignments. They wrote to me last week, by happy coincidence, as follows:

> "We are pleased to report that a favorable resolution has been reached in our complaint of age discrimination. The prompt and firm action taken by the Office of Special Counsel was critical to achieving a withdrawal of the adverse action taken by our agency, the U.S. Geological Survey.
>
> We especially commend the efforts of Patricia A. Stone, principal investigator in our case. Her professionalism and unrelenting effort to resolve this issue are worthy of the highest praise. During the course of the investigation we gained much confidence

> knowing that Ms. Stone was pursuing the case well beyond the scope of a normal 9 to 5 workday. Even when most of Washington, D.C. was snowbound, Ms. Stone continued her work, making her appointments with officials and working by telephone from her home when travel was not possible. There were times during the course of the investigation when knowledge that the Office of Special Counsel was pursuing the case was our only source of optimism because all other avenues of recourse seemed to be of no avail. It was Ms. Stone's professional and tireless endeavor that inspired confidence in us and gave us hope when there was no hope left to sustain us. Ms. Stone exemplifies the very highest standards of Federal service.
>
> The fine work accomplished by your office has restored our confidence at a time when honesty and integrity appear to be lacking in some Federal agencies and has demonstrated that protection of employee rights can be achieved.
>
> Sincerely,
>
> Joseph Hess
>
> Paul E. Felshein
>
> Kurt T. Gunard
>
> Charles S. Smith
>
> G. A. Payne"

A copy of this letter is being provided to the Subcommittee and I request that it also be included in the record of these hearings.

In the short time allotted here, I want to address myself to some of the more egregious misrepresentations about the OSC and its work made by previous witnesses at these hearings, and others. First, several witnesses have charged, with no supporting details whatsoever, that the OSC "funneled" information back to the agencies for use in building a case against them. In my experience, this is categorically untrue. This charge is one of several spurious or misleading allegations that have been made repeatedly by GAP, which knows or should know, based on recent experience, that the charge is without foundation.

For example, in connection with our current intensive investigation of the reprisal allegations by four police officers at the Veterans Administration (VA) Medical Center in Cincinnati, Ohio, complainant John Berter appealed his removal for poor performance and AWOL to the Merit Systems Protection Board (MSPB). Following months of intensive OSC investigation, the VA requested our entire file in the Berter matter for use in the agency's case in support of his removal. We refused. The VA obtained an MSPB subpoena for the records. We told the VA that we would oppose compliance with the subpoena, and proceeded to prepare motion papers seeking to quash it.

While this was in process, Joseph Kennedy of GAP called to inquire as to what our office intended to do in response to VA's demand for our file. He was informed that we were moving to quash the subpoena. Action on our motion was mooted when we were informed that GAP had withdrawn from legal representation of Mr. Berter, and that he had withdrawn his appeal to the MSPB less than a week before the scheduled hearing in May.

Incidentally, with that action, Mr. Berter gave up his existing independent right of action for redress of unjustified or illegal personnel actions. The MSPB hearing would have provided an opportunity for a full hearing and resolution of the issues involved in the OSC investigation. Nevertheless, the OSC is currently analyzing a massive investigative file to determine if Mr. Berter and the other complainants were the victims of reprisal for whistleblowing.

With respect to that inquiry, I must say that recent charges by GAP that the OSC is engaged in a "cover up" of police misconduct at the VA Medical Center are nothing short of preposterous. I have no difficulty telling this Subcommittee that I can understand that the public's reaction is likely to be one of alarm and concern when presented with the renditions at the VA Medical Center that have been widely circulated to the press to date.

Nevertheless, an escalating barrage of charges has attempted to lay the responsibility for correcting any abuses at the doorstep of the OSC and to fault it for not having done so. The proponents of these attacks entirely misperceive the respective authorities and responsibilities of the OSC and the other cognizant agencies. Those agencies with the statutory responsibility for prosecuting, disciplining and correcting any police misconduct--and that is not the OSC--have been involved in the case.

The Department of Justice reviewed the matter for possible criminal violations of law and concluded that the evidence did not support federal criminal prosecution. It is within the purview of the VA to inquire into the matter for violations of administrative rules and procedures, including standards of conduct violations, and to take any administrative action that may be warranted. The OSC and the VA Office of Inspector General (OIG) have cooperated in the investigation arising out of the allegations of excessive force by police personnel at the Medical Center for our respective purposes--that is, for purposes within our respective jurisdictions. The OSC has investigated for purposes of attempting to determine whether the complainants were reprised against for reasonably believed disclosures of misconduct, and the VA-OIG is concerned with the issue of whether the misconduct occurred, and if so, what should be done about it. In fact, we have provided the VA-OIG with all of our investigative data on that issue adduced to date to assist them and the VA in making that determination.

The OSC at present is now actively reviewing and analyzing voluminous quantities of data in an effort to determine whether we can prove that actions taken against the complainants were done so in reprisal rather than on independent grounds of misconduct or poor performance. I am at a loss to understand how anyone can conclude, before the investigation is completed and without access to all of the evidence being accumulated by the OSC, that we have failed to carry out our responsibility--not to mention the responsibilities of other agencies.

Now I want to address some of the other statements that were made to you at last week's hearing. Lawrence T. Reid's testimony, for example, was replete with errors and omissions. First, he testified that it required six months of painstaking effort before the OSC intake officer finally decided that his case warranted a "rarely utilized" field investigation. I would not characterize 200 field investigations a year to be a rare utilization of that activity. Second, Mr. Reid exaggerated by three full months the length of time between receipt of his complaint (on January 22, 1986) and referral for investigation (on April 22, 1986). Third, he testified that the OSC required him to prepare a detailed legal brief for OSC attorneys. The OSC investigator firmly denies that he ever required Reid or his attorney to submit a legal brief, or that he made the other remarks attributed to him--he merely requested that they forward documents mentioned by them in an initial interview.

As to the substance of Mr. Reid's complaint to the OSC, the case failed not only because there were serious questions about when and to whom he made any disclosures of fraud, waste or abuse (Mr. Reid's own accounts varied somewhat), but because the evidence was so strong of apparently valid, supervening causes for the agency's actions, by independent entities outside Reid's command, with little or no involvement by the subject of his complaint.

Prior to these hearings, Mr. Reid requested the OSC to re-consider the decision to close his case, and we will do so. I do not want to compromise that process by venturing any forecast of its outcome. I will say that even if it can be shown that he made disclosures before December of 1983 or January of 1984, other conduct related to what he himself described in a January 1984 memorandum as a year-long series of problems regarding the adequacy and accuracy of his travel vouchers, and the independent inquiries and actions of the NTC, the Naval Investigative Service, and the Naval Intelligence Command and others involved in his suspension and other actions, will pose serious obstacles to proving that the actions were a reprisal, rather than a response to other problems with his conduct.

Joseph Whitson testified about an alleged string of broken appointments without advance notice by OSC investigators, including Patricia Stone (the subject of the letter I read to you earlier). Clearly, there is at least a theoretical possibility that unavoidable circumstances (travel delays, missed messages, etc.) may result in a situation where an investigator cannot contact a witness before breaking an appointment. But to the best of my office's ability to reconstruct the events of Mr. Whitson's case in 1985, there is no evidence that what he described occurred by Investigator Stone, or anyone else. For my part, I certainly would not condone any conscious disregard of the basic amenity of apprising a witness in advance, to the extent possible, that an appointment cannot be kept. It is true that several individuals dealt with Mr. Whitson during his case--the complaints examiner, two investigators and one of their supervisors. Given limited staff resources and travel funds to engage in the extensive travel required, the complexity of the cases, staff turnover and other considerations it should not be surprising that on occasion, witnesses will come into contact with more than one investigator in a given case.

Following receipt of the Whitson complaint on or about August 23, 1984, he was contacted by an investigator assigned to the preliminary processing of his complaint in the Complaints Examining Unit on or about September 18, 1984. The case was initially sent for investigation to the Dallas Field Office in November 1984, where it was assigned for investigation by Rodney Williams. In January 1985, the case was reassigned to the Washington, D.C. office, to take advantage of investigative expertise suited to the issues involved in the case.

Mr. Whitson alleged that he was told by Investigator Williams that the case had been transferred from Dallas to Washington because of its "political sensitivity." Mr. Williams categorically denies that claim. Cases are sometimes transferred from one location to another, or handled by different investigators for one of a number of possible reasons--including adjustment of workload to permit more expeditious investigation of a case, access to investigative expertise in a given area, timelier or more efficient pursuit of leads--but never in my experience because they are "politically sensitive."

Mr. Whitson was in phone contact with Ms. Stone and her supervisor on several occasions between January and August of 1985. Also during that period, Ms. Stone had received regular correspondence with documents sent by him, and other documentary evidence relevant to his case had been gathered. Mr. Whitson alleged that on the occasion of his visit to our D.C. office in August of 1985, Ms. Stone's comments revealed that she knew little, or anything, about his case. Curiously, in May of 1985, Mr. Whitson sent documents to Ms. Stone and wrote: "I know now from our conversations how understaffed your office is. I do appreciate the time that you are devoting to this matter . . . ."

Harold Hipple, another of last week's witnesses, told you that the OSC did not interview him until September of 1987. In fact, Mr. Hipple was interviewed by telephone in July of 1987, before another interview in September. Mr. Hipple also misinformed this Subcommittee regarding the circumstances surrounding two polygraph examinations administered to him. Mr. Hipple's allegation that another officer at the VA was told by Vincent Russell of the OSC staff to resign his position and that the OSC would then be in a position to help him, is also an egregious misrepresentation. Not only did Mr. Russell not tell him to do so, it would make no sense for an employee of the OSC to do so, since under the law, an employee's voluntary resignation significantly undercuts our ability to provide relief.

Also included in the misguided criticism of the

OSC is the charge that we refuse to receive evidence from our complainants. A recent example is the criticism of the OSC in its current investigation of the alleged reprisals against the police officers at the VA Medical Center. The OSC investigator declined to accept some evidence from one complainant which the complainant wanted transmitted to the Federal Bureau of Investigations (FBI). Prudently, in my view, the complainant was advised to take his evidence directly to the FBI agent he was dealing with, so as not to unduly delay their investigation or to cause chain of custody problems, and with the understanding that we would have access to the information as needed for our inquiry. One would expect a police officer and his legal representatives to understand those concepts.

I have said publicly on a number of occasions that it is my policy to receive any documentation that a complainant wants to submit in support of their complaints. As to witnesses, a complainant's identification of possible witnesses is welcomed and given every consideration. The OSC will never, in my tenure, turn a blind eye to relevant evidence. But the final judgement as to what witnesses are relevant to the matter at hand, and how many need to be interviewed to establish any given element, is always within the discretion of any investigative office. For example, the fact that ten additional witnesses can bolster the established fact that a disclosure was made, will do little to contribute to proof of causation and I see no reason why our limited resources should be devoted to the acquisition of unnecessary cumulative evidence.

These are but a few of the spurious, inflated and inaccurate charges made against OSC, bearing upon the basic integrity of its investigative and decision-making processes, and upon its individual members. Anyone, myself included, looking hard enough over a long enough period of time--eight years in our case--can find some isolated, inconsequential or apparent lapse in standard practices or procedures, or can find some opportunity to take issue with judgements that are just that--judgements, albeit informed ones by professionals trained and experienced to make such decisions, and as qualified as anyone else, if not more so, to make them. What I take exception to is the perpetuation of long-standing, historic grievances with the OSC, including forays into investigative micromanagement, with next to no critical analysis of the entire context within which the OSC operates today, or of the directions in which I am leading the office.

I cannot accept that the OSC's investigative and decision-making processes are as flawed as last week's and this morning's witnesses would have you believe, nor do they deviate from investigative practices and procedures generally followed by investigative agencies across the Government. In fact, the OSC generally subscribes to the quality standards governing investigative activities adopted by the President's Council on Integrity and Efficiency. I also do not accept that the OSC's commitment to the utmost protection of whistleblowers within the confines of the law, is as shallow as previous witnesses would have you believe. Finally, I reject the proposition that the OSC under my tenure must accept the large part of any responsibility for any apparent defects in the system of redress established for whistleblowers.

This is not to say that as I conclude the first year of my term, I and my staff are not concerned with ways in which to enhance our effectiveness and our productive utilization of all the legal tools currently available to us. One of the ways in which I had hoped, and still hope, to do so is to work with this Subcommittee in a constructive effort to identify ways in which whistleblower protections under law can be enhanced.

The OSC under my stewardship has been and will continue to be strongly committed to the merit system principle that employees should be protected against reprisals for disclosures of violations of law, mismanagement, waste, abuse or dangers to public health and safety, through vigorous pursuit of: 1) corrective action on behalf of individual employees suffering from a reprisal, up to and including litigation as necessary to obtain such action, and 2) disciplinary action against officials who take such reprisals. I should add that this commitment extends not only to whistleblowers, but to any employee who can be shown to have been the victim of a prohibited personnel practice.

Whistleblowing is an activity that takes place every day in the government, in numbers that can only be guessed at, but there are some helpful points of reference. In Fiscal Year 1986, the statutory OIGs completed over 20,000 audits and investigations; GAO conducted 1,024 audits; in the same period, there were approximately 21,600 calls to the OIG fraud hotlines, and approximately 13,000 calls to the GAO Hotline. These numbers do not, of course, begin to account for the untold thousands of disclosures made within agencies each year during the ordinary course of agency operations, nor to the press or to the Congress.

In the first 10 months of my term as Special Counsel, the OSC received 849 complaints alleging the commission of at least one of the 11 prohibited personnel practices defined by law, of which reprisal for whistleblowing was alleged in 176 complaints, representing 16% of all complaints. In the continuing dialogue about the laws designed to foster whistleblowing and to deter reprisals, the surprising fact may be that so few complaints for whistleblowing reprisal are made at all.

On the average, only 250 complaints have been been received each year by the OSC since 1979. Precise figures are unavailable for the frequency with which reprisal has been invoked as a defense to personnel actions in appeals to the MSPB, but from Fiscal Years 1979-1986, we find citations to only 51 reported cases in the Federal courts involving First Amendment speech issues in relation to personnel actions in the federal government--this, in a workforce of 3.1 million federal employees, making untold thousands of disclosures in audits and investigations, to the OIG and GAO hotlines, to the press, the Congress, their supervisors, and elsewhere. Whether or not these figures indicate that reprisals for whistleblowing are an endemic problem of massive proportions, warranting the wholesale revision of the remedial processes for employees alleging the commission of any prohibited personnel practice in relation to any personnel action is, therefore, a debatable proposition.

I hasten to say at this point that while the extent of reprisals for whistleblowing may be open to question, there can be no question but that any reprisal for whistleblowing is intolerable. The OSC under my tenure is, and will continue to be, solidly committed to the investigation and prosecution of meritorious whistleblower reprisal cases. My priorities for the OSC are clear, and they are as follows:

1. allegations of reprisal for whistleblowing will be treated as our highest priority;

2. allegations of reprisal for whistleblowing will be intensively reviewed for any feasible action, whether by means of stays, corrective or disciplinary action;

3. OSC will use every opportunity to make a public record of aggressive pursuit of corrective action, both to encourage other whistleblowers, and to correct the lingering misperception in some quarters that the OSC is interested solely in the pursuit of disciplinary action.

However, as the GAO noted in its 1985 report on the OSC's handling of reprisal allegations, the adequacy of whistleblower protections should not be viewed solely by reference to cases handled by the OSC, since responsibility for establishment and maintenance of a climate in which whistleblowing is supported, and in which reprisals for whistleblowing are not tolerated is shared by the government as a whole--including the President, the Congress, agency heads, managers and supervisors, appellate systems, and the Inspectors General.

As for the OSC, we operate at all times within the framework of the law enacted in 1978, as interpreted and applied by the MSPB and the courts. It is the same law and legal framework that applies to claims of reprisal raised by employees in appeals of adverse actions before the MSPB, and in First Amendment claims brought in the Federal courts, for which reason, we have seen no persuasive evidence that the OSC's disposition of allegations of reprisal are significantly different than outcomes achieved by employees in any other fora.

S. 508 represents an effort to deal with the issues inherent in whistleblowing, and with other prohibited personnel practices, although, as I have indicated earlier, the dimensions of the perceived problem have yet to be satisfactorily defined. In many essential respects, S. 508 is patterned after H.R. 25, introduced by Representative Schroeder. In most respects in which it differs from H.R. 25, we find it preferable.

I have one reservation about S. 508's definition of the OSC's responsibility. I think it is important to make the point that I see no conflict or contradiction between protection of employee rights and protection of the merit system as a whole, through both corrective and disciplinary actions. So while I see the protection of employees as a primary mission of the office, I do not think that that role is in any way diminished by the protection of the merit system as a coordinate primary mission of the office.

Each and every case handled by my office is looked at for any feasible corrective action and any potential disciplinary action--conversely, neither remedy is sought at the expense of, or to the exclusion of the other. The protection of employee rights and the merit system are, and ought to be, mutually supportive, such that I question the need for designation of either as the one and only "primary" mission of the office. I believe that a balance can be achieved and is being achieved between the two roles, based on our sense that what advances one by definition advances the other. I discuss other, significant concerns about S. 508 at length in my formal statement, although it is hoped that these and other ramifications of the bill can be discussed and resolved with you in further dialogue about this measure.

I believe that the OSC should be, and be perceived to be, part of the solution to any problem that may exist in this area, and not, as some would have you and other federal employees believe--the problem itself. I believe that our record, particularly in the past 11 months, speaks for the OSC's commitment to the vigorous use of the tools available to us on behalf of whistleblowers, when the facts of each case support the belief that a reprisal for whistleblowing has occurred, is occurring or is about to occur.

I would be less than honest, however, if I said that there are no changes that can be made that would enhance our ability to protect whistleblowers. I would like to begin the dialogue I spoke of by suggesting two amendments that I believe would assist the OSC in providing some additional, or expedited assistance to whistleblowers. First, 5 U.S.C. Section 2302(b)(8) could be amended to extend additional protection to employees for threats to take or not to take a reprisal for protected disclosures. This expansion of prohibited acts in reprisal would be consistent with a similar prohibition against reprisals for the making of protected disclosures found in Section 7 of the Inspector General Act of 1978 (at 5 U.S.C. App.).

Second, it has been my experience that most federal agencies have been responsive to my requests for stays and corrective action, as evidenced by our progress to date in obtaining those interim and final actions on a broad array of fronts. Nevertheless, I believe that our position would be strengthened, and timelier relief made more possible when necessary, by the addition of direct authority to order stays and corrective actions whenever we have grounds to believe that a reprisal has occurred, is occurring or is about to occur, with provision for appeal of an OSC order by agencies in appropriate cases. Any stay authority should be of sufficient duration as to permit us to perform at least a basic inquiry into the essential elements of a reprisal case.

I hope that these suggestions are of some assistance in the current dialogue about any additional whistleblower protections that may be warranted. I thank the Subcommittee for its consideration of my views, and I would be pleased to answer any questions at this time.

STATEMENT OF
LLEWELLYN M. FISCHER

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear on behalf of the Merit Systems Protection Board. The Board strongly endorses the principles of protecting whistleblowers from reprisal and providing remedies for prohibited personnel practices. However, the Board, a quasi-judicial agency of the Government, is charged under the proposed legislation with the responsibility of rendering decisions. Therefore, consistent with the current statutory command that it not issue advisory opinions, and to avoid any appearance of prejudgment, the Board takes no position on the substantive and procedural provisions of S. 508, the Whistleblower Protection Act of 1987. Rather, the following remarks are directed toward the practical impact of the bill on Board operations.

The bill substantially expands the scope of the Board's jurisdiction. Under current law, the Board's jurisdiction is generally limited in disciplinary and performance actions to competitive service and certain preference eligible employees. The bill extends Board jurisdiction to all current employees, former employees, and applicants for employment when a prohibited personnel practice is alleged. Section 1221 also provides that additional personnel actions can be appealed. Under the present statute, individuals can appeal adverse actions, performance-based actions, and a few other actions appealable under Office of Personnel Management regulations. The bill allows appeals from numerous additional actions including appointments, promotions, details, performance evaluations, and other decisions concerning pay, benefits, awards, and training. This expansion of Board jurisdiction promises to increase its workload.

In addition, it is foreseeable that the bill could have a significant impact on the Federal Equal Employment Opportunity process should employees choose to bypass it in favor of Board appeals. Currently, discrimination matters which would be covered by the bill are processed internally by federal agencies and later through a formal appeal process with the Equal Employment Opportunity Commission. Under the bill, claims of discrimination, denominated prohibited personnel practices, could be pursued through the internal agency process or filed with the Office of Special Counsel (OSC) and then with the Board. The bill does not require that the appellant elect an exclusive avenue, so the same action may be appealed under both procedures.

We note that the Senate bill eliminates the 60-day deadline that H.R. 25, the House companion bill, would require for the issuance of decisions brought under section 1221. The elimination of this short timeframe is a positive step because it allows sufficient time for a measured adjudication by the Board. Additionally, section 1221 of the bill requires persons covered by the bill to seek corrective action from OSC before filing an appeal with the Board. This requirement, as distinguished from the House companion bill, preserves a primary role for that office in the area of investigations and provides an opportunity for early resolution.

There are several practical considerations of the enhanced procedural benefits provided by S. 508 that warrant discussion. First is whether existing regulatory time limits should be made to apply to the filing of a section 1221 appeal at some point after the 60th day of an OSC investigation. Under current practice, an appellant must file an appeal with the Board within 20 days of the final agency personnel action. Some time limitation is necessary to prevent stale claims.

A second issue involves the bill's silence concerning the character of the Board's proceeding under section 1221. For example, it leaves unstated whether appellants are entitled to a two-tiered Board proceeding. Currently, initial decisions of the Board's regional offices may, as a matter of right, be reviewed by the collegial three-member Board. As drafted, we believe the Board itself would possess the plenary authority to decide what adjudicative procedures should apply to the processing of section 1221 appeals.

The bill will undoubtedly cause an increase in the Board's workload, but there are difficulties in predicting the exact increase involved and the additional resources needed. We note that the Special Counsel received approximately 1400 complaints in each of the last three fiscal years. Because the proposed legislation provides the possibility of obtaining a stay of the personnel action pending a Board decision, the Board would appear to be a more attractive forum than the OSC. Therefore it could be argued that a corresponding increase of 1400 cases -- about 20 percent in terms of our current caseload -- could be projected for the Board.

While it will not increase the Board's caseload directly, the provision of the bill dealing with judicial review may further complicate the already complex civil service laws. Under a proposed change in section 7703, appeals from Board decisions could be brought in the regional federal circuit courts of appeals, as well as the Court of Appeals for the Federal Circuit. Currently, nearly all appeals from Board decisions are heard by the Federal Circuit. Allowing civil service law that regulates the Federal workplace to be fashioned by twelve different circuit courts does not promote uniform treatment of government employees. A single reviewing court, however, is an important ingredient in providing uniform rules for all Federal workers.

We welcome the revisions to the House bill that are included in S. 508, including the deletion of the 60-day time limit on the processing of section 1221 appeals. We look forward to continuing our work with the Committee on this proposed legislation.

Thank you, Mr. Chairman, and I would be pleased to answer any questions you may have.

ANSWERS OF LLEWELLYN M. FISCHER, GENERAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD, TO QUESTIONS SUBMITTED BY SENATOR DAVID PRYOR ON S.508, THE WHISTLEBLOWER PROTECTION ACT OF 1987

1. Question: It has been suggested that there should be more and different penalties for those who take prohibited actions against a whistleblower. These include demotions, transfers, and increased fines for the wrongdoer.

Would you support such changes? Would the MSPB make use of enhanced disciplinary authority?

Answer: As explained in my written statement, the Board cannot render advisory opinions. Accordingly, the Board cannot take a position on the types of penalties which should be provided in the statute. We can, however, offer some comments based on our experience imposing sanctions under the current provision found at 5 U.S.C. § 1207(b).

Some clarification of the current penalty provision would be beneficial. Section 1207(b) states:

> A final order of the Board may impose disciplinary action consisting of removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000.

The penalties listed are separated by the disjunctive "or", and it has been argued in court, but not decided, that the Board may not combine two penalties in a given case. The Board has, nevertheless, imposed multiple penalties on several occasions; for example, the sanctions of removal and debarment from the Federal service for a period of years have been used, as has the combination of demotion and a $1000 civil fine. It would help the Board fulfill Congress' intent if the penalty provision, S.508, § 1215(a)(3), made clear whether the penalties can be combined.

The Board also has adjudicated at least one case where the penalties available under section 1207(b) may not have served their intended purpose because the respondent retired from the Federal service after the Board issued a decision suspending him for 60 days. Upon the Special Counsel's motion for enforcement, the Board reconsidered the penalty and ordered that an amount equivalent to 60 days pay be withheld from the respondent's retirement benefits. On appeal to the U.S. Court of Appeals for the Ninth Circuit, this sanction was reversed as exceeding the penalties set forth in the statute. On remand, the Board reduced the penalty to the statutory maximum $1000 fine. If the statute had provided additional or non-exclusive sanctions, the Board's selection of penalty might have been affirmed.

2. Question: Witnesses have suggested that whistleblowers receive a bonus or promotion as part of a decision in their favor. Another proposal would establish a "relocation program" for whistleblowers, giving him or her preferential standing for jobs elsewhere in government.

Would you support these proposals?

Answer: As a general proposition, the Board is in favor of encouraging whistleblowing. However, I will limit my answer to commenting on the impact that the suggested whistleblower rewards would have on the Board itself. The Board could implement any statutory requirement that a successful whistleblower be given a bonus and/or preferential treatment for jobs elsewhere in government by placing appropriate language in Board final orders. We assume that the statute would provide guidance for determining the amount of any bonus, and that OPM would be directed to develop regulations to implement the preferential treatment provision.

The requirement that the successful whistleblower be promoted as part of a Board decision would be more difficult, however, because the question of whether the whistleblower could perform the duties of a higher graded position would become an important consideration which would have to be addressed. If the whistleblower's performance had not been addressed as part of the appeal, the Board would not be able to order the promotion without conditioning the order on the whistleblower's ability to perform at the higher level. Thus it is problematic whether the Board could order a whistleblower promoted in every case.

3. Question: Your testimony suggests that the EEOC process could conceivably be pushed aside in favor of the Board proceedings. Currently, the Board has the right to hear discrimination cases but usually chooses to defer to the EEOC appeals process, is that correct?

Would you be more comfortable with the bill if it included language that would require an appellant to choose either the MSPB or the EEOC route and disallow a dual appeals process?

Answer: When a discrimination issue is raised in an appeal to the Board, the Board is required by 5 U.S.C. § 7702(e) to address the discrimination issue; there is no deferral to the EEOC appeals process. However the Office of Special Counsel is required by 5 U.S.C. § 1206(e)(2) to defer investigating certain matters if it determines the matter would be more appropriately resolved under an administrative appeals procedure.

Even if the bill is modified to require an appellant to elect either the MSPB or the EEOC route, the Board would probably still receive most of the discrimination cases. As noted in my testimony, an appeal to the Board may be more attractive because of the underlying personnel action may be stayed pending the Board's consideration of the appeal, while there is no comparable stay procedure under the EEOC route.

4. Question: You note that the possibility of obtaining a stay from the Board pending its decision may make the MSPB a more attractive appeal route than the OSC. Would a provision giving OSC the ability to order a stay mitigate that attractiveness of the MSPB appeal route?

Answer: The Special Counsel already has the ability to seek a stay from the Board pending the completion of the investigation, and most stay requests are granted by the Board. Amending the bill to give the Office of Special Counsel the stay power it requests probably would result in no significant decrease in employees who come directly to the MSPB 60 days after filing with OSC. The reason for this prediction is that under the bill employees can seek a stay on their own, and no longer will depend on the Special Counsel to seek a stay on their behalf. In addition, the bill provides a stay which will last as long as the employee's appeal is pending before the Board, while the stay authority lasts only during the Special Counsel's investigation, not throughout the pendency of any appeal.

5. I would like to take this opportunity to expand my July 31 remarks before the Subcommittee regarding a proposed arbitration organization solely to decide cases brought by whistleblowers, as suggested by the Coalition to Stop Government Waste. Such an organization would duplicate the functions the Board would perform under the bill. As such, these panels do not appear necessary. While the Coalition implies that the MSPB is not the "unbiased, efficient, inexpensive and expert forum" that should decide whistleblower's complaints, the record shows that it is mistaken in this regard. As the August 1987 report of the General Accounting Office report on the Board demonstrates, the Board has proven itself to be unbiased, efficient, inexpensive and expert on civil service issues. For these reasons, the proposed arbitration organization represents an unnecessary expense.

Department of Justice

STATEMENT

OF

STUART SCHIFFER
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

SUBCOMMITTEE ON FEDERAL SERVICES, POST OFFICE
AND CIVIL SERVICE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

CONCERNING

THE WHISTLEBLOWER PROTECTION ACT OF 1987

S. 508

ON

JULY 31, 1987

I am pleased to appear before you today to discuss the Department's position with regard to S. 508, the Whistleblower Protection Act of 1987. We oppose its enactment in its present form, but support the goal of assuring adequate protection to whistleblowers. As we have done before, we will address many serious reservations the Administration has with the Bill, but stand ready to assist the Subcommittee in developing acceptable modifications.

The Bill would make sweeping changes in an attempt to correct perceived imperfections in the system for protecting the rights of federal employees enacted by the CSRA. Where minor tinkering with the statutory scheme would suffice to correct any problems, the Bill's approach is to fashion new individual causes of action, severely limit a tried and tested screen against the prosecution of wasteful and frivolous litigation, disrupt the careful balance struck by the Civil Service Reform Act between the rights of employees and the need to ensure efficient and effective personnel management, substantially increase the workload of the already overburdened regional federal courts of appeals, and create an independent agency of questionable constitutionality.

Specifically, the Bill would fashion a new cause of action for employees, former employees and applicants for employment to appeal all types of personnel actions to the MSPB, and then to the courts, that are alleged to be the result of prohibited personnel practices. At the same time, it would limit the role of the Special Counsel in screening out meritless and frivolous allegations of prohibited personnel practices; a role which the General Accounting Office found that the Special Counsel fulfilled exceptionally well. Further, the Bill would require the MSPB to order the "correction" of a personnel action if the Special Counsel "demonstrated" that reprisal for whistleblowing was a "factor" in a personnel decision, and the agency that took the action could not demonstrate by a preponderance of the evidence that an independent basis for the personnel action existed and that the independent basis was the sole reason for the taking of the personnel action.

We are concerned especially about the provisions of the Bill which would tamper with the scheme for judicial review of MSPB decisions when there has been no showing that the system needs adjustment. It requires that the MSPB be the respondent in appeals brought under 5 U.S.C. § 7701 in cases where the petitioner was not challenging the merits of the underlying agency action and thus would remove the real party in interest, the employing agency, from the proceedings. It would also amend the Federal Courts Improvement Act of 1982, pursuant to which exclusive jurisdiction to entertain appeals by employees from MSPB decisions (not involving claims of discrimination) in actions initiated by their employing agencies lies in the United States Court of Appeals for the Federal Circuit. Under the Bill, most of these appeals would be considered by the regional courts of appeal with a resultant loss of consistency and a concomitant increase in the workload of those already overburdened courts.

Finally, the Bill would replace the Special Counsel with an independent agency called the Office of Special Counsel. This agency would not be subject to the control of the President. As we have advised Congress in the past, limiting the President's control over his subordinates in the Executive Branch raises grave questions of constitutionality. The Bill also would expand greatly the role of the Special Counsel by authorizing her to appeal decisions of the Merit Systems Protection Board (MSPB), and by granting her authority to represent herself in all federal courts other than the Supreme Court. It also is questionable whether the vesting of this authority in the Special Counsel is constitutional.

Thus, contrary to the Bill's title, it does much more than address the issue of whistleblower protection; in fact, it proposes a wholesale revision of the relationship between the MSPB, the Special Counsel, and the courts and departs dramatically from the scheme enacted by the CSRA for the enforcement of the merit system principles established by the CSRA. It is the Department's view that enactment of the Bill would cause wholesale disruption of federal personnel management, would result in the clogging of the calendar of the MSPB to the extent that the Board would not be able to function in the manner contemplated when it was created by the CSRA, and would unnecessarily increase the burden of the courts.

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The CSRA was the product of years of study which resulted in many well-thought out compromises and careful balances between the rights of employees and the needs of federal managers. The portions of the Bill which create individual causes of action and limit the role of the Special Counsel as a filter for frivolous litigation would greatly disrupt the scheme of the CSRA without offering any promise of improvement. The Bill will return federal personnel management to the days when incompetent employees were left on the federal payroll for years, because managers feared the morass of procedures and review required to terminate or discipline such employees. At the same time, the Bill will encourage the filing of frivolous and meritless appeals to such an extent that valid claims of reprisal could well be lost in the shuffle.

Specifically, proposed section 1221(a)(1) of title 5 would allow any individual affected or about to be affected by a prohibited personnel practice to seek corrective action from the MSPB if the Special Counsel declined to take action or failed to take action within sixty days of the filing of a complaint. In addition, proposed section 1221(g) of title 5 would allow an individual who initiated such an action before the MSPB to seek review of the decisions of the MSPB in a court of appeals. Granting such rights of action would significantly limit the role of the Special Counsel as an effective screen of meritless or frivolous claims of prohibited personnel practice and would result in overwhelming both the MSPB and the courts.

The Comptroller General noted in his report to the Congress dated May 10, 1985, No. B-217796, and reproduced in Whistleblower Protection: Hearings Before the Subcomm. on Civil Service of the House Comm. on Post Office and Civil Service, 99th Cong., 1st Sess. (1985) (Serial No. 99-19) (hereinafter GAO Report) at 69, when commenting upon a proposal to allow employees to sue on their own behalf when they believe they have been subject to a prohibited personnel practice: "The Special Counsel now acts as an effective screening mechanism to limit the volume of complaints that reach the stage of adjudication." Absent the Special Counsel's screening of complaints, we would anticipate that the MSPB and the appellate courts would be required to adjudicate thousands of claims by disgruntled employees. Their dockets would become overburdened, and they would have less time to devote to more meritorious claims. While it is in the realm of possibility that some small number of victims of prohibited personnel practices might be vindicated by the opening of the floodgates now protecting the dockets of the MSPB and the courts of appeals, it is inconceivable to us that that fact would justify granting private rights of actions to individuals to seek redress for personnel actions taken by their agencies that they may not now appeal to the MSPB.

Employees and applicants for employment now can appeal the major types of personnel actions to the MSPB and seek review of the Board's decisions in the United States Court of Appeals for the Federal Circuit or, if their claims involve allegations of discrimination, in the district courts. 5 U.S.C. § 7703(b) (1982). They may seek assistance from the Special Counsel if they believe that more minor personnel actions to which they have been subjected (or which they have not been granted, such as a promotion) were taken for a reason that is a prohibited personnel practice. Employees also may ask redress for what they believe are improperly taken personnel actions through the filing of grievances. The GAO Report indicates that this system has been working well. The Special Counsel has acted in a professional and appropriate manner in protecting the rights of whistleblowers, according to the Comptroller General:

> Comparing the facts with the legal requirements for a successful prosecution, GAO did not find that the Office of the Special Counsel closed any of the cases GAO reviewed without reasonable grounds to do so. GAO also did not find evidence that the whistleblowers in this sample fell victim to any lack of investigative effort on the part of the office.

GAO Report at 27.

The CSRA balanced the rights of employees and the burdens that would be placed upon the administrative appellate system and the judicial system if it had allowed review of every type of personnel action through direct access to the MSPB and the courts by employees. That balancing is at least as important today as it was in 1978. Granting employees direct access to the MSPB and to the courts would require a huge increase in the number of federal attorneys needed to defend those actions. In addition, it would require the appellate courts to spend enormous amounts of time on cases that, for the most part, probably would not merit the time expended upon them.

II

Those portions of the Bill which reestablish the authority of the MSPB are similarly flawed. Under existing law, the Special Counsel may obtain from the MSPB one *ex parte* 15-day stay of a personnel action if the MSPB is persuaded that the Special Counsel has "reasonable grounds" to believe that the personnel action was or is to be taken as the result of a prohibited personnel practice, 5 U.S.C. § 1208(a), and that stay may be extended for a period of not more than an additional 30 days. 5 U.S.C. § 1208(b). However, before the Board may extend a stay beyond 45 days, it must provide the agency involved an opportunity to submit objections to the extension of the stay. The Bill not only would extend the length of initial stays sought by the Special Counsel to 45 days, proposed section 1214(b)(1)(A)(i), but also, for the first time, would grant individuals the right to seek indefinite stays of personnel actions. Proposed 5 U.S.C. § 1221(c). We are aware of no reason for altering the current provisions of law providing for 15- and 30-day stays and the possibility of indefinite stays, in the discretion of the Board.

Further, there is no good reason to prohibit the MSPB from dissolving stays once they are entered. Yet, proposed section

1221(c)(3)(B) would prohibit dissolution of an employee-initiated stay unless the agency could show that failure to modify or dissolve the stay "would result in extreme hardship to the agency." Simply because there was good cause for the issuance of a stay when the Board initially became aware of a situation does not mean that circumstances necessarily will not change or that the Board never will be provided evidence during the course of proceedings before it that indicates that a stay no longer is warranted. The Board, like other adjudicatory and quasi-adjudicatory bodies with authority to issue stays or injunctive relief, should be granted the authority to consider such things as the public interest, not only in determining whether to impose a stay, but also in deciding whether a stay, once granted, should be dissolved.

The Bill seemingly does not require the Board to grant federal agencies the right to present to the MSPB their views as to the appropriateness of a stay before a stay may be imposed by the Board. Without the opportunity for consideration of the views of federal agencies, it is much more likely that Board members will err in assessing the reasonableness of stay requests than if they are advised of the positions of the agencies with regard to the need for stays. Of course, denying agencies the right to present their views to the MSPB concerning the appropriateness of the issuance of stays also is fundamentally unfair.

We also strongly object to the provisions of proposed sections 1214(b)(4)(B)(ii) and 1221(e)(2)(B)(ii) that would abolish the so-called Mt. Healthy test in corrective action cases brought by the Special Counsel and individuals. In Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977), the Supreme Court considered whether a school district could refuse to renew the contract of an employee who had exercised his rights under the First Amendment but who also had engaged in improper actions during his employment under a previous contract if the decision not to renew his contract was based in "substantial part" upon his protected activity. The Court stated:

> A rule of causation which focuses solely on whether protected conduct played a part, "substantial" or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision--even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. 285-286. Accordingly, the Court held unanimously that, in such a case, the employee has the burden of establishing that he engaged in constitutionally protected conduct and that his conduct was a "motivating factor" in the employer's decision, and the employer then may establish "by a preponderance of the evidence that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct. *Id*. at 287.

Aside from making absolute sense, the holding in *Mt. Healthy* is completely consistent with the legislative history of the CSRA. S. Rep. No. 696, 95th Cong., 2d Sess. 22 (1978) states:

> Finally, it should be noted that this section is a prohibition against reprisals. The section should not be construed as protecting an employee who is otherwise engaged in misconduct, or who is incompetent, from appropriate disciplinary action. If, for example, an employee has had several years of inadequate performance, or unsatisfactory performance ratings, or if an employee has engaged in action which would constitute dismissal for cause, the fact that the employee "blows the whistle" on his agency after the agency has begun to initiate disciplinary action against the employee will not protect the employee against such disciplinary action. Whether the disciplinary action is a result of the individual's performance on the job, or whether it is a reprisal because the employee chose to criticize the agency, is a matter for judgment to be determined in the first instance by the agency, and ultimately by the Special Counsel and the Merit Systems Protection Board.

Accordingly, the enactment of the section of the CSRA setting forth those personnel practices that are prohibited was intended to provide employees with shields against unwarranted personnel actions. Congress never intended, by the enactment of 5 U.S.C. § 2302, to provide employees deserving of discipline with the means to block personnel actions that would have been taken against them even if they had not engaged in protected activity.

III

Section 5 of the Bill is particularly ill-conceived. It would amend 5 U.S.C. § 2302(b)(9), which establishes the terms of the prohibited personnel practice of reprisal, to include a prohibition against agencies disciplining their employees for "failing to follow orders to disobey a law." This amendment, if enacted, could cause wholesale insubordination throughout the Government to go unredressed. There are a multitude of federal statutes that are subject to interpretation as to their meaning. Thus, there are instances every day in which federal supervisors direct their subordinates to take action based upon the supervisors' (or other agency managers') interpretations of statutes.

The Bill, if enacted, would appear to allow subordinate employees to determine, based upon their interpretations of statutes, whether to follow the instructions they are given by their supervisors based upon their supervisors' interpretations of the statutes. The chaos that would be engendered easily can be imagined.

IV

We urge Congress not to enact proposed section 7703(a)(2). That section would place the MSPB in the unseemly position of defending its own decisions in the courts. It appears that the purpose of the enactment of that section would be to codify the result in Hopkins v. MSPB, 725 F.2d 1368 (Fed. Cir. 1984), in which the court held that the Board was the proper respondent in a case in which the petitioner is challenging a Board decision concerning the timeliness of an appeal or a decision of the Board as to its jurisdiction, and to make the Board the respondent in an appeal seeking review of a decision on the merits issued by the Board pursuant to proposed section 1221 (an action by an individual alleging that a prohibited personnel action in the taking of a personnel action). In neither situation should the Board represent itself before the courts of appeals.

It is completely inappropriate for the Board, which is a quasi-judicial body, to be involved in the defense of its own decisions. For the Board to be so involved gives rise to the appearance that the Board has some institutional interest in the decisions it issues, rather than merely being an independent and neutral adjudicator of cases within its jurisdiction. Moreover, if section 1221 is enacted and the Board is the respondent in appeals from decisions it issues in such cases adverse to federal employees, it will be required to defend the merits of actions taken by other agencies. The result will be that the agencies, which are the real parties in interest, will not participate in the litigation or, if they do, it will be only as intervenors.

Aside from the unseemliness of the Board defending its own decisions, practical problems will result. For example, it will be extremely difficult for individuals to settle cases on appeal. The Federal Circuit recognized this problem in cases involving claims for attorney fees in which the MSPB was the respondent, e.g., Van Fossen v. MSPB, 788 F.2d 748, 751 n.8 (Fed. Cir. 1986), and this, presumably, was one reason why Hopkins recently was overruled by the Federal Circuit sitting en banc. Hagmeyer v. Department of the Treasury, 809 F.2d 1581 (Fed. Cir. 1987).

V

The Bill also will undo the good work of Congress in enacting the Federal Courts Improvement Act (FCIA) in 1982. The FCIA created the Court of Appeals for the Federal Circuit and granted that court exclusive jurisdiction over appeals from decisions of the MSPB in cases not involving discrimination. Section 4(b) of the Bill would return these appeals to the already overburdened regional courts of appeals.

Congress granted the Federal Circuit exclusive jurisdiction over most MSPB appeals to ease the burden on the regional circuits and to foster uniformity in the federal personnel law area and to provide one judicial forum to guide the MSPB in its adjudication of cases. S. Rep. No. 275, 97th Cong., 1st Sess. 2-4, 7. Absent the centralization of decision-making in one court of appeals, there can be no doubt that there will be division in the circuits with regard to the law in this area, and the MSPB will be left in a quandary as to what law applies in the cases before it.

For example, there will exist such a division immediately upon this Bill becoming law as to the scope of the MSPB's review of agencies' decisions to deny employees within-grade increases. The Federal Circuit has held that the Board is to determine whether agencies establish whether they properly denied within-grade increases by substantial evidence, Romaine v. Defense Contract Audit Agency, 760 F.2d 1286, 1288 (Fed. Cir. 1985), while other courts of appeals, in cases appealed before the enactment of the Federal Courts Improvement Act, determined that agencies were required to establish the propriety of their denials of within-grade increases by a preponderance of the evidence. E.g., Ommaya v. NIH, 726 F.2d 827 (D.C. Cir. 1984); Stankis v. EPA, 713 F.2d 1181 (5th Cir. 1983). While this issue is an important one to the MSPB and the individuals who come before the Board in within-grade increase appeals, it hardly is the type of case that the Supreme Court ought to be required to resolve. That, however, absent legislation in the area, is the only possible manner in which the conflict may be resolved. See, e.g., Bureau of Alcohol, Tobacco, and Firearms v. Federal Labor Relations Authority, 464 U.S. 89 (1983) (Supreme Court required to resolve division in the regional circuits as to whether federal employees representing unions in collective bargaining were entitled to be paid travel and per diem expenses by their employing agencies).

We understand that the impetus for this proposal stems in large part from a perception that the Federal Circuit has been much more inclined to affirm the MSPB than were the regional circuits prior to the enactment of the FCIA. To the extent such a perception exists, it is simply not borne out by the facts. Since its inception on October 1, 1982, the Federal Circuit has dismissed for lack of jurisdiction or affirmed in 93.5 percent of all of the appeals from the MSPB which it has decided in both published and unpublished opinions. A review of only the published decisions of the regional circuits in MSPB appeals issued in 1982 reveals that the courts dismissed for lack of jurisdiction or affirmed in 85.5 percent of those cases. Given that a very large number of the appeals considered by the Federal Circuit were appeals of air traffic controllers who were fired for participating in the 1981 strike and that courts are far more likely to publish decisions reversing an administrative decision than one affirming such a decision, it can be seen readily that employees were no more likely to be successful in the regional circuits than they were in the Federal Circuit. This lack of success was not related to the particular forum; rather, it simply reflects the fact that the MSPB did a good job deciding its cases and that the appeals from its decisions generally lacked merit. Surely, it would be far more disturbing if the evidence established that the MSPB wrongly decided a large percentage of its cases. Given eight years of experience with judicial review under the CSRA, it is safe to say that there is simply no empirical evidence to suggest that the Federal Circuit is biased against federal employees or that, for whatever reason, appeals from the MSPB are more likely to succeed in the regional circuits than in the Federal Circuit. The assumption that the Federal Circuit does not give federal employees as fair a hearing as the regional circuits did simply is wrong.

Thus, granting the regional courts of appeals jurisdiction over appeals from the MSPB in areas of federal personnel law over which the Federal Circuit now has jurisdiction would undo, for no good reason, Congress's sensible centralization of those appeals and would unnecessarily return a heavy burden of appeals to the regional courts which are already struggling under increasing workloads. Moreover, it certainly to some extent would render the expertise gained by the judges of the Federal Circuit in this area superfluous.

VI

Finally, we again must state our strong conviction that the provisions creating the Office of Special Counsel, both as presently enacted and as proposed, are unconstitutional. The role of the Special Counsel as established by the CSRA and as envisioned by the Bill clearly is that of an officer of the Executive Branch. The Special Counsel would function as both a prosecutor of those who violate the principles of the merit system and a protector of those who believe that they have been harmed by the commission of prohibited personnel practices. In both of those functions, the Special Counsel would be acting to insure that the laws are faithfully executed--clearly a function of the Executive Branch. U.S. Const. Art. II, § 3, cl. 4. However, neither the present Special Counsel nor the Special Counsel as conceived by the Bill is or would be subject to the control of the President.

The Special Counsel now is appointed by the President, by and with the advice and consent of the Senate, for a term of five years, but may be removed from office by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1204 (1982). The Bill similarly provides that the Special Counsel would be appointed by the President with the advice and consent of the Senate and that she would serve for a five-year term subject to removal by the President for the same reasons now provided in section 1204. Proposed 5 U.S.C. § 1211(b). This Department consistently has taken the position that the limitation upon the President's authority to remove the Special Counsel for reasons of his own choosing raises serious constitutional questions. In a letter to Chairman Ribicoff of the Senate Committee on Governmental Affairs dated June 14, 1978, Assistant Attorney General Harmon stated at page 6:

> [T]he primary duties of the Special Counsel [would be] (1) to receive and investigate allegations of prohibited personnel practices, and (2) to initiate and prosecute cases involving prohibited personnel practices before the Board.
>
> The functions of the Special Counsel would be predominately executive in character. Even though the Special Counsel will present his cases only to the Board, his role in investigating and prosecuting

> prohibited practices is much the same as that of a United States Attorney or other federal prosecutor. These duties, no less than a prosecutor's, are directed at the enforcement of the laws, and this is a function that the Constitution entrusts to the Executive Branch. See Buckley v. Valeo, 424 U.S. 1, 138 (1976); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928).
>
> If the Special Counsel is appointed by the President, since he will be performing largely executive functions, we believe that Congress may impose no restrictions on the President's power to remove him.

The same rationale applies to the Bill now under consideration; its purported limitation upon the President's authority to remove the Special Counsel is not valid. Myers v. United States, 272 U.S. 52, 164-70 (1926).

Moreover, even if the Bill were altered to provide for presidential control over the Special Counsel, we would not be in favor of extending her authority in the manner proposed by the Bill. Under existing law, the Special Counsel's litigating authority is confined to cases before the MSPB. The Bill would expand this authority by authorizing the Special Counsel to designate attorneys to appear upon her behalf in all courts except the Supreme Court and to seek review in the United States courts of appeals of decisions of the MSPB in any case to which she was a party. Proposed 5 U.S.C. § 1212(c), (d)(3).

This Administration, as a policy matter, generally has opposed any legislative proposal which would erode further the Attorney General's litigating authority under 28 U.S.C. §§ 516, 519. This opposition, shared by previous Administrations, is grounded upon the need for centralized control of all Government litigation. A number of policy goals are furthered by this control, including the presentation of uniform positions upon important legal issues, the objective litigation of cases by attorneys unaffected by the concerns of a single agency that may be inimical to the concerns of the Government as a whole, and the facilitation of presidential supervision over Executive Branch policies implicated in Government litigation. This policy benefits not only the Government but also the courts and opposing litigants which, in the absence of the policy, might be subjected to the assertion of uncoordinated positions on the part of the Government.

There is an additional reason why the Special Counsel should not be granted general litigating authority. An agency's authority to litigate independently of the Attorney General in a particular circumstance generally depends upon whether such authority is vested by statute in the agency. However, when the agency asserting that authority is an Executive Branch agency, constitutional issues arise if Congress also has vested litigating authority over the same case either in the Attorney General or in another Executive Branch officer. At stake are issues involving the President's authority to exercise supervisory control over his subordinates so that he may discharge properly his constitutional obligation to "take care that the laws be faithfully executed," U.S. Const. Art. II, § 3, cl. 4, and Congress's potential violation of the constitutional principle of the separation of powers by its interference with the President's exercise of that authority. See Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, supra.

In view of the broad grant of litigating authority proposed by the Bill, it is clear that the Special Counsel would be authorized to initiate, or otherwise to participate in, litigation in which Executive Branch agencies would be defending themselves against allegations that they committed prohibited personnel practices. Of course, the Department of Justice would be representing the Executive Branch agencies in those cases in which they were involved. In such circumstances, the litigating authority granted to the Special Counsel would place the President in the untenable position of speaking with two conflicting voices by both prosecuting and defending the same action. That is not a constitutionally permissible result, as it would require the President to abdicate his constitutional obligation to execute the laws faithfully and would fall short of "that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone." Myers v. United States, 272 U.S. at 125.

Proposed 5 U.S.C. § 1217 also is constitutionally infirm. That section would allow the Special Counsel or her designee to communicate with the Congress independent of "other administrative authority," presumably the President and the

Office of Management and Budget. Such a provision, if enacted, would permit the Legislative Branch to intrude unconstitutionally upon the President's authority over subordinate officials in the performance of their executive functions. It would impair the President's ability to perform his constitutional obligation to "recommend to [Congress the] consideration of such Measures as he shall judge necessary and expedient." U.S. Const. Art. II, § 3.

As the President's subordinate, the Special Counsel is obligated to make her recommendations to the President so that the President may judge which are "necessary and expedient." For Congress to require the Special Counsel to report directly to it without such review would constitute a grave interference with the President's performance of his constitutional obligations as well as irreparably damage, if not destroy, the normal exchange of views between agency heads and the President. The provision, if enacted, also would create in the Special Counsel divided, and possibly inconsistent, loyalties between the Executive and Legislative Branches, in violation of the doctrine of the separation of powers.

VII

In sum, S. 508 should not be enacted. For no good reason, it would cast aside the years of hard work and compromise which preceded the enactment of the CSRA. The present system works well in the vast majority of cases. Employees' rights are protected, yet the federal personnel system can be managed effectively, efficiently, and fairly. The high goals which

Congress set in enacting the CSRA have been met. If problems are perceived, corrections can be made. The Bill, however, represents a major revision which is unnecessary. Accordingly, the Department is opposed to S. 508 in its present form. We would be willing to work with the Committee to develop an appropriate alternative.

Thank you for inviting me to appear before you today. I would be happy to answer any questions the Subcommittee may have.

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 4, 1987

Honorable David Pryor
Chairman, Subcommittee on Federal Services,
  Post Office, and Civil Service
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your letter of August 18, 1987, submitting questions regarding our views on S. 508. We submit the following responses to your questions:

Question 1. Your statement acknowledges that "some" victims of prohibited personnel practices may be helped by opening appeal rights to the MSPB and the courts. Given your objections to that option, do you have any ideas on how those victims can be better served by the Office of the Special Counsel?

Response: As the present Special Counsel explained in her testimony to the Subcommittee, the Office of the Special Counsel now focuses most of its resources and effort upon obtaining relief for whistleblowers and others who may be the victims of prohibited personnel practices. The appendix to her testimony summarizes a number of specific cases in which the Special Counsel has sought and obtained relief for employees who requested help from her office during the past year. This shift of focus by the Office of the Special Counsel demonstrates that the present statute provides ample tools for the protection of employee rights. Given that shift of focus, the need for direct access to the courts for whistleblowers is substantially lessened, if not eliminated. Indeed, as we suggested in our statement, the disadvantages of allowing direct access to the courts, with the inevitable increase in frivolous and wasteful litigation, far outweighs any potential benefit which might be gained. As the Special Counsel's testimony demonstrates, the system as it is presently structured is working well and there is no need to tamper with it.

Question 2. You question the constitutionality of the Office of Special Counsel. Considering that the same appointment and removal procedures apply to the Merit Systems Protection

Board, do you believe that the MSPB is constitutionally infirm as well?

Response: We have focused our attention on the Special Counsel because, much like a prosecutor, the Special Counsel functions as an officer of the Executive Branch in the classic sense, in that she enforces a specific set of laws and ensures that they are obeyed. Her role is clearly an extension of the constitutional duty of the President to "take Care that the Laws be faithfully executed . . . ." U.S. Const., art. 2, § 3.

Question 3. You protest the changes to the current stay provisions for the OSC. However, I feel that it would be difficult to make a case that the OSC has overused the stay provision. Do you feel that these changes contained in S. 508 could result in a misuse of the stay provisions?

Do you have any reason to believe that OSC would request a stay in a situation in which the Special Counsel did not have reasonable grounds to believe that a prohibited personnel practice had been committed?

Response: We have the utmost confidence in the present Special Counsel and do not believe that she would seek a stay in a case in which she did not consider that there were reasonable grounds to believe that a prohibited personnel practice had been committed. However, the role of the Special Counsel is to be a vigorous prosecutor and advocate, and a case may look significantly different from that perspective than from that of a judge or adjudicator. Under the present system, the Special Counsel can obtain a stay from the board quite easily by presenting some evidence to support her suspicions. Because both the Special Counsel and the employing agency, if it wishes, participate in the proceedings, the board obtains the same advantages which the courts enjoy. The chief advantage of the adversary system, fundamental to our system of jurisprudence and our concept of due process, is that it provides for a sharpening of the issues and ensures that the decision-maker has all of the facts necessary to make a sound decision. No good reason has been suggested for changing the present system to eliminate the existing safeguards.

Question 4. In your closing paragraphs, you state that "If problems are perceived, corrections can be made" and that your Department would be willing to work with this Subcommittee to develop alternatives to S. 508. It is obvious to me that problems are not only perceived but are real. What "corrections" can you suggest to us that will address the problems that we have been discussing today that do not make objectionable revisions to Title 5?

Response: The present system is working well and we know of no reason to change it. While there is always room for some minor adjustments, the proposed bill would radically, unnecessarily, and injuriously disrupt the careful balance created by Congress in the Civil Service Reform Act of 1978 between the rights of employees and the benefit which the public enjoys from the efficient management of the federal personnel system. Accordingly, we strongly recommend that S. 508 not be enacted.

Thank you for giving us this opportunity to answer your questions and clarify our views.

Sincerely,

John R. Bolton
Assistant Attorney General

STATEMENT OF
HONORABLE JAMES E. COLVARD, DEPUTY DIRECTOR
OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON FEDERAL SERVICES, POST OFFICE,
AND CIVIL SERVICE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

on

S. 508

THE WHISTLEBLOWER PROTECTION ACT OF 1987

JULY 31, 1987

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR INVITING ME TO PRESENT THE VIEWS OF THE OFFICE OF PERSONNEL MANAGEMENT ON S. 508, THE "WHISTLEBLOWER PROTECTION ACT OF 1987."

AT THE OUTSET, I WOULD LIKE TO POINT OUT THAT THE STRONG OBJECTIONS I AM GOING TO RAISE AGAINST S. 508 CONCERN THAT BILL AS IT WAS INTRODUCED. WE ARE VERY MUCH AWARE THAT DISCUSSIONS ARE GOING ON THAT MAY RESULT IN CHANGES IN THE BILL THAT WOULD SATISFY OUR CONCERNS.

THE PRESIDENT HAS MADE CLEAR THIS ADMINISTRATION'S STRONG SUPPORT FOR WHISTLEBLOWERS. IT IS ESSENTIAL IN A FREE AND OPEN SOCIETY THAT THOSE WHO EXPOSE WRONGDOING BE PROTECTED FROM REPRISALS. WE SHARE WITH THE SUPPORTERS OF THIS LEGISLATION A STRONG COMMITMENT TO THIS PRINCIPLE. HOWEVER, THE JUSTIFIED ZEAL FOR THE PROTECTION OF BONA FIDE WHISTLEBLOWERS SHOULD NOT LEAD US TO OVERREACT IN WAYS THAT WOULD UNNECESSARILY INCREASE THE COST AND COMPLEXITY OF THE FEDERAL EMPLOYEE APPEALS SYSTEM AND ALLOW EMPLOYEES TO FRUSTRATE AND DELAY LEGITIMATE DISCIPLINARY ACTIONS. WE BELIEVE THAT S. 508 WOULD HAVE EXACTLY THIS EFFECT.

WE QUESTION THIS BILL'S EFFECTIVENESS IN INCREASING PROTECTION FOR LEGITIMATE WHISTLEBLOWERS, AND BELIEVE THAT IT WILL DO SERIOUS DAMAGE TO THE GOVERNMENT'S SYSTEM FOR HANDLING EMPLOYEE DISCIPLINE AND APPEALS. UNDER THE GUISE OF WHISTLEBLOWER PROTECTION, S. 508 PROPOSES A MAJOR RESTRUCTURING OF THE CAREFULLY BALANCED SYSTEM OF EMPLOYEE APPEALS CREATED BY THE CIVIL SERVICE REFORM ACT (CSRA). IT WOULD ALSO UNDO ONE OF THE MAJOR ACCOMPLISHMENTS OF THE FEDERAL COURTS IMPROVEMENT ACT OF 1982 BY DISMANTLING THE UNIFORM AND RESPONSIVE SYSTEM EMPLOYEES CURRENTLY HAVE FOR SEEKING JUDICIAL REVIEW OF UNFAVORABLE DECISIONS BY THE MERIT SYSTEMS PROTECTION BOARD. IN LIGHT OF THE LACK OF EVIDENCE DEMONSTRATING A DEFICIENCY IN THE CURRENT SYSTEM FOR PROTECTING WHISTLEBLOWERS, WE QUESTION THE NEED FOR A MAJOR RESTRUCTURING OF THIS SYSTEM IN PARTICULAR, AND AN OVERHAUL OF THE ENTIRE DISCIPLINARY AND APPELLATE SYSTEM IN GENERAL.

THE LEGISLATION UNDER CONSIDERATION WOULD CHANGE THE BASIC FUNCTION OF THE OFFICE OF THE SPECIAL COUNSEL (OSC). ALTHOUGH THE LANGUAGE IN S. 508 HAS BEEN SOFTENED FROM OTHER

PROPOSALS (WHICH WOULD REQUIRE OSC TO ESTABLISH A "LAWYER-CLIENT RELATIONSHIP" WITH EMPLOYEES, OR TO "REPRESENT AND ACT ON BEHALF OF" EMPLOYEES). THE BILL NEVERTHELESS ESTABLISHES AS THE PRIMARY FUNCTION OF OSC THE PROTECTION OF EMPLOYEES, FORMER EMPLOYEES, AND APPLICANTS FOR EMPLOYMENT FROM PROHIBITED PERSONNEL PRACTICES. THIS REQUIREMENT WOULD CHANGE THE EMPHASIS OF THE SPECIAL COUNSEL FROM BEING ESSENTIALLY THE ADVOCATE OF THE MERIT SYSTEM TO PROTECTING THE INTERESTS OF INDIVIDUAL EMPLOYEES. IN ADDITION, THE BILL GIVES EMPLOYEES THE RIGHT TO BYPASS OSC, IF OSC DECLINES TO PURSUE THEIR COMPLAINT, OR FAILS TO PURSUE IT PROMPTLY, AND APPEAL DIRECTLY TO MSPB OR REQUEST STAYS OF AGENCY PERSONNEL ACTIONS THEMSELVES, THEREBY FURTHER COMPLICATING AN ALREADY OVERBURDENED SYSTEM AND UNDERMINING OSC'S CENTRAL ROLE IN PROTECTING WHISTLEBLOWERS. WE BELIEVE THAT THESE CHANGES WILL BE COUNTERPRODUCTIVE AND ACTUALLY DECREASE THE PROBABILITY THAT LEGITIMATE WHISTLEBLOWERS WILL RECEIVE THE FULL CONSIDERATION TO WHICH THEY ARE ENTITLED.

WE CONTINUE TO BELIEVE THAT THE SYSTEM ESTABLISHED BY THE CSRA EFFECTIVELY BALANCES THE INTERESTS OF BONA FIDE WHISTLEBLOWERS AND OTHER VICTIMS OF PROHIBITED PERSONNEL PRACTICES WITH THE NECESSITY FOR EFFICIENT OPERATIONS OF AGENCIES. IT DOES THIS BY PROMOTING BOTH THE VIGOROUS PROSECUTION OF AGENCY OFFICIALS WHO COMMIT PROHIBITED REPRISAL, AND THE

JUDICIOUS AND VIGILANT USE OF THE SPECIAL COUNSEL'S CORRECTIVE ACTION AUTHORITY TO ENSURE THAT LEGITIMATE WHISTLEBLOWERS ARE NOT IMPROPERLY PUNISHED FOR THEIR DISCLOSURES.

THE BILL FAILS TO RECOGNIZE THAT THE CURRENT FEDERAL GRIEVANCE AND APPEALS SYSTEM PROVIDES SEVERAL MEANS FOR EMPLOYEES TO RAISE ALLEGATIONS OF REPRISAL, RETALIATION, OR HARASSMENT IN CONNECTION WITH WHISTLEBLOWING ACTIVITIES. EMPLOYEES CAN RAISE IMPROPER MOTIVATION IN THE "REGULAR" MSPB APPEALS PROCESS, IN DISCRIMINATION COMPLAINTS, AND UNDER AGENCY AND NEGOTIATED GRIEVANCE PROCEDURES. HOWEVER, WHISTLEBLOWING ALLEGATIONS DO NOT FREQUENTLY ARISE UNDER THESE SYSTEMS. SIXTY PERCENT OF OUR WORK FORCE HAS ACCESS TO THE NEGOTIATED GRIEVANCE SYSTEM, YET A REVIEW OF 5500 ARBITRATION AWARDS SINCE THE PASSAGE OF THE CSRA IN 1978 INDICATES THAT SUBSTANTIALLY FEWER THAN 1 PERCENT OF THEM INVOLVE EMPLOYEES ALLEGING REPRISAL FOR WHISTLEBLOWING.

IT IS ESSENTIAL THAT WE ALL RECOGNIZE, IN URGING VIGOROUS PROSECUTION OF BONA FIDE WHISTLEBLOWER CASES, THAT THERE ARE A GREAT MANY CASES WHERE CLAIMS OF WHISTLEBLOWER REPRISAL ARE RAISED, BUT WHERE THESE CLAIMS ARE SPURIOUS. ACCORDING TO A RECENT REPORT BY THE GENERAL ACCOUNTING OFFICE, WHICH REVIEWED IN DETAIL OSC'S HANDLING OF WHISTLEBLOWER CASES, FEW OF THE CASES RECEIVED BY OSC HAVE SUFFICIENT MERIT TO WARRANT

FOLLOW-UP OF ANY TYPE, LET ALONE PROSECUTION. BY SCREENING OUT SUCH CASES, WORKING TO RESOLVE CASES INFORMALLY, AND VIGOROUSLY PURSUING LEGITIMATE WHISTLEBLOWER CASES, OSC HAS TAKEN THE RIGHT APPROACH IN PROTECTING REAL WHISTLEBLOWERS AND PROMOTING EFFICIENCY IN GOVERNMENT.

WHILE WE QUESTION THE EFFECTIVENESS OF THE PROPOSED CHANGES AIMED SPECIFICALLY AT "WHISTLEBLOWER PROTECTION," WE ARE PARTICULARLY CONCERNED WITH THE PROVISIONS OF S. 508 THAT WOULD FUNDAMENTALLY ALTER THE EMPLOYEE APPEALS SYSTEM ESTABLISHED BY THE CSRA, AND THE REFORMS MADE BY THE FEDERAL COURTS IMPROVEMENT ACT OF 1982. FOR EXAMPLE, THE BILL ALLOWS EMPLOYEES, IN THE ABSENCE OF OSC ACTION, TO REQUEST MSPB TO STAY A DISCIPLINARY ACTION PRIOR TO ITS TAKING EFFECT. THIS WOULD INCREASE THE BOARD'S WORKLOAD AND DISRUPT AGENCIES' ABILITY AND WILLINGNESS TO TAKE DISCIPLINARY ACTIONS WHEN APPROPRIATE. UNDER CURRENT LAW, THE SPECIAL COUNSEL HAS THE AUTHORITY TO REQUEST THE MSPB TO ORDER A STAY WHEN OSC BELIEVES AN EMPLOYEE HAS BEEN OR WILL BE ADVERSELY AFFECTED BY A PROHIBITED PERSONNEL PRACTICE. OSC HAS USED THIS AUTHORITY ON SEVERAL OCCASIONS AND THE MSPB HAS RESPONDED AFFIRMATIVELY IN ALMOST EVERY CASE.

THE BILL WOULD ALSO DISRUPT THE BALANCE BETWEEN EMPLOYEE PROTECTION AND MANAGEMENT AUTHORITY ESTABLISHED BY THE SUPREME COURT IN MT. HEALTHY VS. DOYLE FOR "DUAL MOTIVATION"

CASES. THE "MT. HEALTHY TEST" ALLOWS AGENCY DISCIPLINARY ACTIONS TO STAND IF THE AGENCY CAN PROVE THAT, NOTWITHSTANDING THE FACT THAT AN EMPLOYEE ALLEGES REPRISAL OR CLAIMS UNFAIR TREATMENT, THE AGENCY WOULD HAVE TAKEN THE ADVERSE PERSONNEL ACTION ANYWAY FOR LEGITIMATE REASONS. THE MT. HEALTHY TEST HAS BEEN THE CORNERSTONE FOR RESOLVING DUAL MOTIVATION CASES AND SERVES IN MANY OTHER KINDS OF EMPLOYEE APPEALS AS WELL. ELIMINATION OF THIS BALANCING TEST WILL RESULT IN THE RETENTION OF EMPLOYEES WHO CLEARLY PERFORM UNACCEPTABLY, OR WHO IMPAIR THE SAFETY AND EFFICIENCY OF THE FEDERAL SERVICE. IT WILL ALSO ENCOURAGE FRIVOLOUS APPEALS FROM EMPLOYEES SEEKING TO INSULATE THEMSELVES FROM OTHERWISE LEGITIMATE ACTIONS. ELIMINATION OF THIS TEST WILL UPSET THE BALANCE BETWEEN EMPLOYEE PROTECTION AND MANAGEMENT AUTHORITY, DECREASING THE PROBABILITY OF EFFECTIVE DISCIPLINARY ACTION WHEN IT IS NEEDED.

THE ABILITY OF AGENCIES TO TAKE LEGITIMATE DISCIPLINARY ACTIONS COULD ALSO BE IMPAIRED BY THE PROVISION IN THE BILL THAT WOULD MAKE IT A PROHIBITED PERSONNEL PRACTICE TO DISCIPLINE AN EMPLOYEE "FOR FAILING TO FOLLOW ORDERS TO DISOBEY A LAW." THIS PROVISION INVITES DISRUPTIONS IN GOVERNMENT OPERATIONS BY ALLOWING EVERY EMPLOYEE TO DECIDE FOR HIMSELF OR HERSELF WHETHER A SUPERVISOR'S INSTRUCTIONS ARE CONSISTENT WITH LAW, AND TO REFUSE TO DO WHAT HE OR SHE

IS TOLD TO DO IF THE EMPLOYEE BELIEVES IT IS NOT. THIS WOULD COUNTENANCE, AND QUITE POSSIBLY ENCOURAGE, INSUBORDINATION. ABOVE ALL, THIS PROVISION IS UNNECESSARY, AS EMPLOYEES WHO ARE DISCIPLINED UNDER CURRENT LAW FOR INSUBORDINATION CAN GRIEVE OR APPEAL ON THE GROUNDS THAT A SUPERVISOR'S ORDER WAS IMPROPERLY MOTIVATED, ILLEGAL, OR UNCLEARLY CONVEYED, OR THAT FOR OTHER REASONS THE DISCIPLINARY ACTION DOES NOT PROMOTE THE EFFICIENCY OF THE SERVICE.

IN ADDITION, WE ARE TROUBLED BY THE BILL'S REQUIREMENT FOR THE REINSTATEMENT OF EMPLOYEES WHO PREVAIL IN THE INITIAL STAGES OF MSPB APPEALS. THE CURRENT SYSTEM PROVIDES FOR FULL BACK PAY, REINSTATEMENT OF ALL BENEFITS, AND PAYMENT OF ATTORNEY FEES IF THE EMPLOYEE PREVAILS IN THE FINAL MSPB DECISION. THE TYPE OF INTERIM RELIEF PROPOSED IN S. 508 WOULD CREATE FURTHER CONFUSION IN THE APPEALS SYSTEM AND RESULT IN A VERY DIFFICULT WORKING RELATIONSHIP BETWEEN MANAGEMENT AND THE EMPLOYEE DURING THE INTERIM PERIOD.

FINALLY, S. 508 TAKES AN UNNECESSARY STEP BACKWARDS BY REPEALING ONE OF THE MAJOR ACHIEVEMENTS MADE BY THE FEDERAL COURTS IMPROVEMENT ACT OF 1982. THE BILL WOULD ESTABLISH AN OPTION FOR AN EMPLOYEE TO APPEAL, AT HIS DISCRETION, ANY DECISION OF MSPB TO WHICH HE IS A PARTY (OTHER THAN CERTAIN DISCRIMINATION CASES) TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT OR TO THE COURT OF APPEALS FOR THE JUDICIAL CIRCUIT

IN WHICH HE RESIDES, RATHER THAN LIMITING JUDICIAL REVIEW TO THE FEDERAL CIRCUIT. AS A RESULT, THE FEDERAL EMPLOYEE DISCIPLINARY SYSTEM WOULD OPERATE UNDER DIFFERENT JUDICIAL PRECEDENTS IN DIFFERENT PARTS OF THE COUNTRY WHENEVER THE COURTS OF APPEALS IN DIFFERENT CIRCUITS DISAGREE. FURTHERMORE, THE BILL FAILS TO PROVIDE STATUTORY STANDARDS TO THE OTHER CIRCUITS FOR REVIEWING MSPB DECISIONS, IN THE WAY SUCH STANDARDS ARE NOW, AND WOULD CONTINUE TO BE, PROVIDED TO THE FEDERAL CIRCUIT. THIS CHAOTIC APPROACH WOULD PLACE A FURTHER BURDEN ON AGENCIES ATTEMPTING TO IMPLEMENT UNIFORM AND CONSISTENT DISCIPLINARY POLICIES. THIS CHANGE IS WHOLLY UNNECESSARY IN VIEW OF THE HERETOFORE SUCCESSFUL ROLE OF THE FEDERAL CIRCUIT COURT OF APPEALS, WHICH WE BELIEVE SHOULD CONTINUE AS THE SOLE VENUE FOR APPEALS OF SUCH MSPB DECISIONS.

IN SUM, S. 508 MAKES MAJOR AND MINOR CHANGES TO THE CAREFULLY BALANCED SYSTEM ESTABLISHED BY THE CSRA. WHILE WE ARE EAGER TO ENSURE PROTECTION FOR BONA FIDE WHISTLEBLOWERS, WE CANNOT SUPPORT CHANGES OF QUESTIONABLE EFFICACY WHICH WOULD FUNDAMENTALLY ALTER THE EQUILIBRIUM THAT MUST BE MAINTAINED BETWEEN EMPLOYEE PROTECTION AND MANAGEMENT AUTHORITY. THEREFORE, WE ARE STRONGLY OPPOSED TO THE ENACTMENT OF S. 508 IN

ITS PRESENT FORM. HOWEVER, LET ME REITERATE OUR HOPE THAT THE DISCUSSIONS NOW GOING ON MAY RESULT IN CHANGES IN S. 508 THAT WILL SATISFY THE CONCERNS WE HAVE OVER THIS BILL.

THANK YOU. I WOULD BE PLEASED TO ANSWER ANY QUESTIONS THE SUBCOMMITTEE MAY HAVE.

OFFICE OF PERSONNEL MANAGEMENT

QUESTIONS SUBMITTED BY SENATOR DAVID PRYOR

Q. You oppose the change included in S. 508 which would charge the Office of Special Counsel with protecting employees rather than the merit system. Wouldn't the process of insuring that individuals receive the full protection of law by definition protect the merit system?

A. We strongly support the full protection of whistleblowers. However, we believe that changing the Office of Special Counsel's role to that of an employee protector, as proposed by S. 508, may indeed result in a diminution of protection for the merit system as a whole. The bill would establish an ambiguous relationship between OSC and employees that approaches representation. In a time of limited resources, and with the potential for a significantly increased workload for OSC, the new responsibilities which the bill would place on OSC would tax its resources to the overall detriment of the merit system. In its role as protector of employees, OSC would likely be required to continue involvement in cases of dubious validity after OSC's initial review and disposition. Such continuing involvement would divert resources from legitimate whistleblower cases, and call into question OSC's objectivity with respect to further administrative or judicial proceedings involving cases which were initially dismissed by OSC as without merit.

Q. You protest the provision in the bill which gives employees the right to appeal directly to MSPB if OSC declines to investigate their complaint or fails to act on it within 60 days on the basis that legitimate whistleblowers may receive even less consideration that they currently do. Could you elaborate on that comment?

A. The provision in the bill which allows employees to bypass OSC, if OSC declines to pursue their complaint or fails to pursue it promptly, holds the potential for a serious negative impact on the Federal employee appeals system. The Merit Systems Protection Board (MSPB) described this impact in its testimony on S. 508:

> The bill substantially expands the scope of the Board's jurisdiction. Under current law, the Board's jurisdiction is generally limited in disciplinary and performance actions to competitive service and certain preference eligible employees. The bill extends Board jurisdiction to all current employees, former employees, and applicants for employment when a prohibited personnel practice is

alleged. Section 1221 also provides that additional personnel actions can be appealed. Under the present statute, individuals can appeal adverse actions, performance-based actions, and a few other actions appealable under Office of Personnel Management regulations. The bill allows appeals from numerous additional actions including appointments, promotions, details, performance evaluations, and other decisions concerning pay, benefits, awards, and training. This expansion of Board jurisdiction promises to increase its workload.

- Thus, finite resources will necessarily be diluted by having to address the less serious matters which the bill allows to be appealed to MSPB. Furthermore, OSC itself may well be overwhelmed by spurious or trivial complaints, since the bill requires filing with OSC in order to have a further appeal right to MSPB. The General Accounting Office has already confirmed the problem which exists under the current system--that of identifying legitimate whistleblowers, and giving them the attention they deserve, so as to not squander resources on employees who file frivolous or unfounded complaints. The bill would create a situation in which bona fide whistleblowers would encounter new competition for investigatory and adjudicatory resources.

- In addition to the increased burden for OSC and MSPB, the bill would increase the workload for agency legal staffs and personnel staffs, which would be hard-pressed to manage and properly defend the multiple appeals filed with OSC, MSPB, EEOC, and the courts. To the extent that the dispute resolution process avoids agency administrative and negotiated grievance systems, and moves towards disposition by OSC, MSPB, and the courts, the system will become more complex and costly.

Q. You are concerned with the ability of an employee to go directly to the MSPB and request a stay. In defense of the current system, you say that OSC has used its authority to request stay "on several occasions" and it has worked quite well. First of all, I'd like to say that I think Congress envisioned the OSC using its stay authority more than several times.

I'd also like to get your views on a change to the stay authority that has been suggested. What is your opinion on giving OSC the ability to order a stay without having to go to the MSPB?

A. We would have no objection to a provision which would allow OSC to order a stay unilaterally, provided this authority would be limited to situations where OSC has reasonable cause to believe that a personnel action has been or will be taken in retaliation for whistleblowing, and provided the affected agency may appeal the stay order to MSPB, and MSPB may overturn the OSC order if the agency establishes a legitimate reason for the action.

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 15, 1987

Honorable Carl Levin
United State Senate
459 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Levin:

It is my understanding that you will soon be holding a hearing on S. 508. It may be useful for you to be informed of a recent development in the Judicial Branch concerning that bill.

Section 4(b) of the bill would provide that review of final orders or decisions of the Merit Systems Protection Board, which now lies exclusively in the Court of Appeals for the Federal Circuit, be made available either in the Court of Appeals for the Federal Circuit or in the court of appeals for the circuit within which the petitioner resides.

The Federal Jurisdiction Subcommittee of the Committee on Court Administration of the Judicial Conference reviewed this proposed change at its meeting in June 1987. In recommending that the Judicial Conference oppose the change unless compelling reasons justify it, the Subcommittee made the following observations in its report to the Committee on Court Administration:

> The Subcommittee does not know the motive that underlies this proposal. Unless there is some demonstrated hardship resulting from the present provision, however, it is recommended that the proposed amendment be opposed. Until 1982, review was available in the Court of Claims or a United States Court of Appeals. Less than five years of experience has been available to test the current provision for review only in the Court of Appeals for the Federal Circuit. The Subcommittee is not aware of any unusual problems in the Administration of Justice during this period. The opportunity to choose review in a regional court of appeals will likely create inconsistent positions on matters that deserve a uniform national rule. The only obvious need to run this risk would arise if the requirement of appeal to the Federal Circuit imposes significant costs and delays compared to a hearing in a regional circuit. The Judicial Conference should recommend that this amendment not be adopted unless compelling reasons can be found to depart from the judgment made in 1982 that the benefits of exclusive Federal Circuit jurisdiction outweigh the potential costs.

I should emphasize that this action is not Judicial Conference policy. The resolution will be considered by the Court Administration Committee on July 21, 1987 and, if approved, by the Judicial Conference in September.

Nonetheless, I feel this early expression of concern may be relevant to your consideration.

Sincerely,

L. Ralph Mecham
Director

AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

SECRETARY
William H. Neukom
P.O. Box 97017
16011 N.E. 36th Way
Redmond, WA 98073-9717

August 12, 1987

The Honorable David H. Pryor
Chairman, Subcommittee on Federal Services,
Post Office, and Civil Service, Senate
Committee on Governmental Affairs
601 Hart Senate Office Building
Washington, D.C. 20510-6252

Dear Mr. Chairman:

As Secretary of the American Bar Association, I am pleased to submit to you a Resolution adopted by the ABA's House of Delegates at our Annual Meeting this week advocating strengthened protection for federal "whistleblower" employees. Also enclosed is the Report supporting the Resolution.

The Section's Resolution supports the basic principle that federal civil servants who believe that they are victims of reprisals as a result of their "whistleblowing" activities should be entitled to seek stays and corrective action without necessarily being represented by the Office of Special Counsel.

Sincerely,

William Neukom
Secretary

WN/kci

AMERICAN BAR ASSOCIATION
SECTION OF ADMINISTRATIVE LAW
REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association supports amendment of the Civil Service Reform Act with respect to strengthening protections for federal civil servants who disclose information on mismanagement, gross waste, violations of law, rule or regulation, abuse of authority or substantial and specific danger to public health or safety, by providing that such employees who allege they are victims of reprisals may seek stays and corrective action from the Merit Systems Protection Board, and may appeal Merit Systems Protection Board decisions to court without necessarily being represented by the Office of the Special Counsel.

117C

REPORT

An important public interest in reducing government expenditures resulting from fraud, waste and abuse of law and authority has been thwarted by inadequate protections for Federal employees who disclose such information. Legislation has been introduced in Congress which would strengthen those protections and would permit government employees who believe that they are the victims of reprisals for disclosing fraud, waste and abuse of law, to request corrective action administratively and thereafter to appeal to the courts without depending on the Office of Special Counsel to bring such complaints on their behalf. The Section of Administrative Law believes that this is a matter of national importance deserving the support of the American Bar Association.

In 1978 Congress substantially revised the Federal Civil Service System by enacting the Civil Service Reform Act of 1978 (P.L. 95-454). (CSRA). Congressional concern over protecting taxpayers from illegality, waste and abuse found expression in the Act when Congress wrote into law that civil service "whistleblowers" should not be subject to reprisal and that those Federal managers who took such reprisals should be punished. Earlier in 1978, the Senate Governmental Affairs Committee had released a report on whistleblowing in the Federal Government which stated, "The sincere whistleblower's experience is colored by confusion, hypocrisy, and uncertainty." A Federal employee can only "attempt to correct a problem at the risk of his or her career, financial security, and reputation."

The CSRA created three institutions out of the old Civil Service Commission:

--The Office of Personnel Management, the Government's management agency, to generally administer the civil service system;

--The Merit Systems Protection Board, an independent quasi-judicial body, to hear and adjudicate employee appeals from adverse agency actions; and

--The Office of Special Counsel, the investigative and prosecutorial arm of the MSPB, to present cases involving prohibited personnel practices to MSPB.

The CSRA also established 11 prohibited personnel practices which for the first time, codified the right of employees to be free from arbitrary action.

One of the most significant of the prohibited personnel practices codified in the CSRA was the ban on specific forms of retaliation against whistleblowers. Specifically prohibited is retaliation for any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation; mismanagement; gross waste of funds or abuse of authority; or substantial and specific danger to public health and safety (5 U.S.C. 2302(b)(8)). For the disclosure of information, the public release of which is barred by statute or by executive order due to national security considerations, whistleblowers are still protected if they make the disclosure to the head of the agency, the Inspector General or the Special Counsel of the Merit Systems Protection Board.

Unfortunately, in the eight years of its existence the Office of Special Counsel has been woefully inadequate in protecting whistleblowers from reprisal. The purpose of this resolution is to support legislation which will specifically strengthen the Office of Special Counsel and will permit legitimate whistleblowers to seek protection when the Special Counsel will not seek it on their behalf.

A bill known as the Whistleblower Protection Act was introduced with bipartisan support in the last Congress and passed the House of Representatives by voice vote in September 1986. There was insufficient time for the Senate to act on it prior to adjournment, but early hearings were promised in this session of Congress. Although the leadership of the Senate has changed, early hearings before the Senate Post Office and Civil Service Subcommittee on the bill are expected. The bill has been reintroduced in the House as H.R. 25 in the form it passed last year, and hearings were held on March 10, 1987. It has bipartisan support and almost 60 sponsors. It has been reintroduced in the Senate as S. 508, also with bipartisan support. Among the many organizations supporting the bill is the Federal Bar Association which on March 18, 1987 adopted a resolution similar to the one adopted by the ABA's Section on Administrative Law.

Although the bills contain various procedural and substantive changes, the resolution supports the broad principles of the bills: that the Office of Special Counsel should be made more effective and that an employee who believes he is the victim of reprisals should have the ability to control the development of his case through private counsel. The latter can be accomplished by granting those employees the right to seek protection and redress from the Merit Systems Protection Board and subsequently from the courts, without being dependent on the Office of Special Counsel to act on the employees' behalf, which presently is the only way employees who disclose violations can be protected.

The findings and purposes of the bills are stated in Sec. 2 as follows: [1]

> (a) Findings.--The Congress finds that--
>
> (1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;
>
> (2) protecting employees who disclose Government illegality, waste and corruption is a major step toward a more effective civil service; and
>
> (3) in passing the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel to provide whistleblowers (those individuals who make disclosures described in such section 2302(b)(8) protection from reprisal.
>
> (b) PURPOSES.--The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within Government by--
>
> (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices;
>
> (2) establishing--
>
> (A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers; and

---

[1] The stated purposes of the House and Senate bills differ slightly. The Senate version of subsec.(b)(2)(A) states that the primary role of the Office of Special Counsel is to protect whistleblowers "from prohibited personnel practices." The House bill adds a third purpose "providing that the Office of Special Counsel represent employees, former employees, and applicants for employment with the Federal Government who claim to have been subject to prohibited personnel practices."

(B) that while disciplining those who commit prohibited personnel practices may be used as a means to help accomplish this goal, the protection of individuals remains the paramount consideration.

In summary, the bills reaffirm congressional support for civil servants who blow the whistle on waste, mismanagement, or wrongdoing and provide stronger mechanisms to protect whistleblowers from reprisal. In addition, the bill strengthens the Office of Special Counsel by: (a) establishing it as an independent agency, separate from the MSPB; (b) strengthening the OSC's current power to seek stays and corrective action for employees who are victims of prohibited personnel practices and to seek disciplinary action against those who engage in prohibited personnel practices; (c) giving the OSC the power to take its cases to court if it loses before the MSPB; and (d) expanding the subpoena authority of the OSC to permit subpoenas of Government employees outside of the United States.

The House and Senate versions of the bill, while substantially the same, differ with respect to whether an employee could seek administrative review on his own behalf without first bringing the alleged reprisal to the Office of Special Counsel: The House bill would permit the employee to bring the complaint directly to the MSPB, while the Senate bill would require a 60-day waiting period to give the Special Counsel an opportunity to review and seek corrective action on the employee's behalf. The Section of Administrative Law believes that either version is a vast and long-needed improvement of the current situation. Rather than endorse one or the other version, it endorses and recommends a resolution by the ABA covering either version and endorsing the bill's broad principles and not its specific provisions, leaving those to be worked out by the appropriate Congressional committees.

The protection of public sector whistleblowers is not just a federal problem, but a state and local problem as well. That this issue has significance to the bar is amply documented by the recent report of the ABA's State and Local Government Bargaining Committee's Subcommitte on Special Problems at the mid-winter meeting on February 16-17, 1987. That Committee reported that there are presently 25 states with some sort of whistleblower law on the books, ranging from protections for state employees only to state, local and private sector employees. It was reported that most states provide for civil suit enforcement, but a few require the employee to exhaust administrative remedies first.

117C

The House Committee Report accompanying last year's bill clearly demonstrates the need for Federal employees to be able to go directly to the MSPB and the courts if the Office of Special Counsel chooses not to pursue their complaints. As noted in the House report, after eight years of operation, the Office of Special Counsel has turned down more than 99 percent of the whistleblower cases brought to it, and for the last 5 years, since 1981, it has not filed a corrective action complaint to restore the job of any whistleblower (H.R. Rep. 99-859 99th Cong. 2d Sess, 17).

The House report states:

> According to studies by the Merit Systems Protection Board, the number of Federal employees who feel that they cannot safety come forward with allegations of waste or mismanagement is increasing. In 1980, 20 percent of employees who perceived agency problems did not report them because of fear of reprisal. In 1983, that figure had grown to 37 percent. The number of employees who refrain from disclosing wrongdoing because they do not expect the disclosure to result in eliminating the wrongdoing has also grown--from 53 percent in 1980 to 61 percent in 1983. According to the MSPB studies, the primary reason that Government employees remain silent is their belief that it will not make any difference if they speak out.
>
> Since the establishment of the OSC, one Special Counsel has taught a course for Federal managers on how to fire whistleblowers by referring to them as "malcontents" and "informants" and likening them to bag ladies and mental health patients. One Special Counsel even warned would-be whistleblowers to keep quiet or they would get their heads blown off.

(H.R. Rep. 99-859, p. 17).

The House Report continues:

> Testimony before the Subcommittee on Civil Service showed that the Special Counsel closes one-third to one-half of all its cases without meeting with the complainant and without conducting any inquiry at all. When the Special Counsel does open an investigation, OSC investigators explicitly discourage employees from presenting evidence and often refuse to contact witnesses suggested by them. Recently, the Office's top priority was to close cases and members of the staff were given quotas on the number of cases they were to close by specified

> dates. The Special Counsel routinely closes cases and advises the complainants through form letters only of the fact that the case has been closed. Often no reason is provided for the termination of the investigation. The Office has refused to share information from the OSC investigative file with the complainant, even when the file contained information important for the individual's case in another forum.
>
> The General Accounting Office (GAO) found that in fiscal year 1984 the Special Counsel conducted actual investigations for only 8 percent of individuals who requested assistance. The Subcommittee on Civil Service has been unable to find a single individual who has gone to the Office of Special Counsel since 1981 who has been satisfied with the investigation of his or her case.

(H.R. Rep. 99-859, p. 18-19).

The House Report further states:

> The Special Counsel has the responsibility of seeking corrective action for individuals adversely affected by prohibited personnel practices. If an initial investigation indicates that a reprisal has occurred, the Special Counsel should recommend to the head of the agency that the reprisal action be ended. If the head of the agency does not agree, the OSC can take the complaint to the Merit Systems Protection Board to seek enforcement of the recommendation.
>
> Again, the results have been unsatisfactory. In 1985, the GAO reported that out of the 1,500 requests for Special Counsel assistance since the OSC was established in 1979, only 16 have led to petitions for corrective action. No corrective action petition has been filed in the last four years. In fact, GAO found that the only redress the Special Counsel secured for any complainants for the two year period was from August 1982 to August 1984, was to convince agencies, through informal means, to cancel the transfers of three employees.
>
> In testimony presented before the House Subcommittee on Civil Service, Special Counsel O'Conner denied any responsibility to assist wronged individuals. He maintained that his client was the merit system, and that he had no duty to help

117C

> individuals. Indeed, Mr. O'Conner referred to the victims of retaliations as "witnesses". . . .
>
> The Office of Special Counsel has been unwilling to risk losing a case. In 1985, the Office of Special Counsel told the GAO that it would litigate on behalf of whistleblowers only if there was a 70 to 80 percent chance of winning. The 1985 annual report of the Office of Special Counsel said that there must be a "virtual certainty that the evidence provides sufficient facts to ensure success. . . ."
>
> The Special Counsel has imposed settlements on complainants against their will. One witness before the subcommittee, William Tuesburg of the Department of Housing and Urban Development, characterized the Special Counsel's "success" in his case-- including his unwanted transfer-- as a further reprisal. . . .
>
> Moreover, the Special Counsel has attacked the motives of individuals who have come to him for help. Mr. O'Conner asserted in subcommittee hearings . . . that complainants he turned away have almost always lost their cases everywhere else as well. Subcommittee investigation showed that Mr. O'Conner's allegations were unfounded.
>
> Given the animus recent special counsels have shown toward individuals who seek the help of the Office of Special Counsel, the committee determined that these individuals should have the right to pursue their own cases, without use of the Special Counsel. Under current law, individuals who allege that they are victims of prohibited personnel practices have no appeal from a decision by the Special Counsel to terminate activities on their behalf. The Whistleblower Protection Act of 1986 corrects this by providing complainants with the option of filing their own independent action before the Merit Systems Protection Board alleging a prohibited personnel practice. The determination to provide an independent right of access is not intended to cut off any right that individuals now have to seek redress of wrongs in court.

(H.R.Rep. 99-859, p. 19-20). The record fully supports the finding that government employees should have the right to pursue their own cases without depending on the Special Counsel.

Some have suggested, in view of the Special Counsel's record of not adequately pursuing the protection of whistleblowers, that the Office be abolished and a new system created in its place. This suggestion was one of the alternatives seriously considered by the Congressional sponsors prior to the introduction of the current legislation. In view of the administration's statements at the 1985 oversight hearings that the deficiencies could and would be corrected, a compromise was struct which resulted in the pending bills. These bills have been through two House hearings, have already passed the House of Representatives in the last session of Congress, and the differences between the House and Senate versions have been adjusted.

While many would like to see stronger legislation giving greater protections to whistleblowers, to propose new legislation at this time would deprive federal employees of the substantial improvement in protections that the pending bills offer. Politics has been called the art of the practical. A resolution supporting the abolishment of the Office of Special Counsel, desirable as many think that might be, would not at this time provide a practical solution to providing increased protections for whistleblowers.

No cost to the government is expected to result from this legislation, and it will likely produce substantial savings. The Committee Report accompanying last year's bill stated that its enactment would "not result in any significant additional costs to the government" (H.R. Rep. 99-859, p. 31). In addition, House and Senate statements accompanying the enactment of the 1978 whistleblower legislation expected "phenomenal" potential savings to the government by protecting and thus encouraging employees who disclose billions of dollars of fraud and cost overruns.

Given the seriousness of the problem and the momentum attained in the last session of Congress and the fact that House hearings were held on March 10, 1987, it is probable that early Senate hearings will be held on the bill, and that it will move quickly through the House of Representatives now that it has once passed that body. For that reason, a position in support of the bill is timely and the American Bar

Association is urged to adopt a resolution supporting the bill's purpose.

Respectfully submitted,

Edward J. Grenier, Jr.
Chairman, Section of
Administrative Law

August 1987

STATEMENT BY

KENNETH T. BLAYLOCK
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
(AFL-CIO)

I am Kenneth T. Blaylock, the National President of the American Federation of Government Employees, AFL-CIO.

I am pleased to have this opportunity to submit our views on S.508, a bill to strengthen the protections available to federal employees against prohibited personnel practices and for other purposes. In particular, we are pleased that Senators Levin and Grassley have introduced S.508 to address this very important issue.

AFGE represents approximately 700,000 employees in agencies throughout the Government, and hence, it has a vital interest in measures which are predicated upon merit system principles and which help to insure that the Federal Government does not become subject to politicization and corruption. We are of the opinion that whistleblower protections can help achieve this vital policy. That is why AFGE was in the forefront of supporting the measures of the Civil Service Reform Act which were designed to insure protections for whistleblowers. Unfortunately, as we all know, those provisions have not worked well. Certainly, reforms need to be made in this area, and we offer the following insights into the legislation introduced by Senators Levin and Grassley.

Any legislative measure addressing the whistleblower issue must have as its paramount objective the protection of the whistleblower. It must also be designed to create a special atmosphere--one where employees feel comfortable reporting to the designated officials instances where there is wrongdoing.

Such a measure must not only espouse the intent to protect the whistleblower and encourage him to come forward but the procedural mechanisms must be designed to insure that the intent cannot be thwarted; that the goals sought to be achieved, will be achieved.

S.508 clearly has the highest intentions, but it seems to fall short of achieving some of its goals. Upon reviewing S.508, three questions are raised:

1. How does S.508 provide relief for those whistleblowers who suffer retributive action, such as not receiving meaningful work assignments, but who are not dismissed or demoted or made subject to any action falling within the very narrow definition of a prohibited personnel action?

2. Does S.508 alleviate the burden now faced by the whistleblower of having to prove his case twice; once before the Special Counsel and then before the MSPB?

3. How does S.508 provide assurances that something positive and tangible will be done about instances of fraud, waste, abuse, etc?

Any legislation aimed at achieving the desired reform should specifically address these questions.

S.508 uses a two-pronged approach in handling whistleblower complaints. The concept of providing one process for complaints of wrongdoing and a different process for complaints of reprisals for whistleblowing might provide a workable framework but not as the two pronged approach is utilized in the S.508.

It is our understanding that S1213 was designed to address complaints of violations of any law, rule or regulation, or of mismanagement, waste, abuse of authority or a substantial and specific danger to public health or safety. The procedure for handling the investigation of such a complaint is:

> (a) Upon receipt of a complaint, the Special Counsel has 15 days to review the information to determine if there is a substantial likelihood that there is a violation.
>
> (b) Upon a positive determination, the Special Counsel transmits the information to the Agency and directs it to conduct an investigation.
>
> (c) The Agency reports back to the Congress, the President and to the Special Counsel.
>
> (d) The Special Counsel shall review the report.

It has been pointed out numerous times that you can't ask the fox to clean the chicken coop--in many instances, it is absolutely useless to ask the agency which is allegedly committing the violation to investigate. Furthermore, it undermines what is a paramount goal, namely, of creating an atmosphere such that federal employees will want to assist the government in curing instances of wrong doing. Certainly an employee who perhaps has been unsuccessful within his own agency in attempting to cure a wrongdoing would not feel comfortable having his formal complaint to the Special Counsel simply returned to the agency for investigation. This certainly won't be cured by requiring the agency to send a copy of its report to the President and to the Congress.

If the Special Counsel determines there is a substantial likelihood of a violation, she should investigate and order corrective action. In this regard, Section 1206(c) of the current Civil Service Reform Act should be rewritten to enhance the Special Counsel's powers to order corrective action *sua sponte* after completing her investigation. Further, some standards must be set for the conduct of investigations. There must be guidelines that will enable petty complaints to be separated from those of legitimate wrongdoing. If the employee is dissatisfied with the Special Counsel's actions in the case, the right to a private de novo cause of action would cure the deficiencies of the Special Counsel. Subsequently, as is the case now under Section 1207, if a violation has occurred which is not a violation of a criminal law, the Special Counsel should have the authority to bring an action before the MSPB seeking sanctions against those individuals who are directly responsible for the violation.

In our view, the operative effects of §1214 would not adequately change the existing plight of whistleblowers who have been victims of reprisal actions. Under this section, if an employee is successful in convincing the Special Counsel that a prohibited personnel practice has occurred, then what he might get is a chance to convince the MSPB. This is duplicitous and unnecessary. The extreme burdens presently placed on whistleblowers both in the necessity for and expense of a MSPB hearing coupled with the heavy burden of proof is perhaps the most pervading reason why the current system does not work. The ironic aspect of this is that none of this was ever contemplated when the present provisions were drafted. These burdens, solely, are the creation of the MSPB. If the Special Counsel is to have jurisdiction over this area, then give her some authority. Provide that she must investigate all complaints. Give her the authority to order stays while she investigates. Most importantly, enhance what is now Section 1206(c) and permit her to order and enforce corrective actions in cases where she finds a violation. It is only when the Special Counsel seeks sanctions against an employee believed to be responsible for the commission of a prohibited personnel practice under what is currently Section 1207 that a separate MSPB hearing should ever be necessary. In that instance, the Special Counsel would be the petitioner with the accused being the respondent. The whistleblower in such a case would be a witness and would not be on trial him/herself or responsible for carrying the burden of proof.

Finally, as a basic premise, the definition of prohibited personnel practices must be expanded. Some of the most frequently encountered forms of reprisal are those which presently do not come within the definition of 5 U.S.C. §2302. We urge you to strengthen S.508 to fully remedy the pitfalls of the existing whistleblower protections.

STATEMENT FOR THE RECORD BY
BILL BUSH
ON SENATE BILL S.508
JULY 17, 1987

Before the Subcommittee on
Federal Services, Post Office and Civil Service
Of the United States Senate Committee on Governmental Affairs

Mr. Chairman and Subcommittee Members:

In response to your gracious letter of July 2, 1987, I eagerly submit this testimony for the record of the hearings regarding the protections of federal employees who act contrary to undesirable official policies in the interest of our Society.

A. Introduction.

My name is Bill Bush. I am a former National Aeronautics and Space Administration (NASA) whistleblower who is retired. As an avocation for the last eight years, I have served as an unofficial advisor and confidant to ethical resisters and to citizens contemplating involving themselves in the dangerous endeavor of dissent. In preparation for the role of counselor, I have studied the history of expressions of opinion in depth. My fond ambition is to live at a time when I can in good conscience advise citizens that it is safe to expose fraud, waste of taxpayer-derived resources, abuse of power (including cruelties to the helpless), injustice, mismanagement, health or safety hazards, corruption, security breaches, procurement irregularities, inefficiencies, violations of laws or regulations, conflicts of interest, and other egregious wrongs.

The sponsors of Senate Bill S.205 are to be commended for perceiving this serious problem confronting our Country.

B. Recommendations.

1. Focus. The principal objective of the proposed changes in the Law should be to protect the Public from the evils of governmental mismanagement. This suggests that the bill be entitled to reflect that purpose. Spokespersons for officials who do not desire to be held accountable for their mistakes are less likely to oppose reform that is unequivocally stipulated to be for the benefit of all law-abiding citizens. Some officials who are unduly sensitive to adverse criticism may be distressed to learn of any attempt to shield "disloyal" employees from retribution. Accordingly, one suggestion is to name this bill the "Efficient Governmental Operations Act of 1987." The selected title should reflect that the focus is on the Public Good, rather than on the means employed in achieving that salubrious goal.

2. The Means. There are two effective techniques for improving communications absolutely essential for efficient governmental operations: first, by insisting that management wisely tolerate dissent that is altruistically made in the public interest; and second, by assuring that employees may offer comments on problems without suffering reprisals of any type.

(a) Sensible Reaction to Dissent. One beneficial practice is to ensure that management sincerely enlist suggestions from subordinates by grading all federal supervisors on how effectively they utilize positive dissent. Indubitably, petty grousing need not be accorded much serious attention. Supervisors who promote an "open door" communications policy are naturally more likely to make sound decisions and to manage more wisely than autocrats who vent their spleen on subordinates who disagree with their preconceived prejudices. This meritorious concept should be promulgated by incorporating it into the Code of Ethics of Government Service that is displayed in summary form in most government facilities. If management would react sensibly to appropriate dissent, much benefit would accrue to Society. My experience is that some supervisors are too interested in maintaining the *status quo* to be receptive to any changes in the way business has always been conducted.

A classic example that illustrates this point is the positive manner in which President Theodore Roosevelt reacted to the written criticisms of the U. S. Navy's gunnery techniques by Lt. William Sowden Sims in 1901 and 1902. The busy Executive replied: "I thank you for writing me; I shall always be pleased to hear from you, in criticism, or suggestion." "Teddy" ordered that the Navy test Sim's theories, evaluated the results, convinced himself of the cogent merit of his suggestions, and then had the innovator promoted before year's end. Early in 1909 Sim's superiors plotted to have their "insubordinate" underling court-martialed as soon as Roosevelt retired to private life. The great leader, who wisely valued sincere contributions, ordered that Sim's mediocre fitness reports depict, with graphic explanations, the hundreds of beneficial actions taken by the Navy as a direct result of Sim's recommendations. The President's intercession squelched any more talk of court-martial of Sims. Let us observe that Sims fortunately did not need legislated protections against reprisals, or intricate remedies for injuries---**he had an ideal boss**!

(b) Freedom to Dissent. Another proven measure that could enhance the Public Good is the encouragement of federal employees, who are undoubtedly in a favorable position to observe deviant operations, to expose those undesirable activities in one or more appropriate forums, to be empowered with the legal right to decline to obey illegal orders, and to refuse legally to perform acts likely to be injurious to themselves or the Public.

3. Definition of Protected Activities. Actions and expressions by federal employees in the best interest of the Public must be identified as protected activities. The definition must encompass a wide range of expression: statements of fact, disclosures of mischief by government/contractor personnel, refusal to obey an illegal order that the employee reasonably believed in good faith to have been illegal at the time that the employee disobeyed, and refusal to conduct unsafe operations. A requirement that disclosures must first be made within the organization is anathema to the success of the avowed objective, and may be disadvantageous to the welfare of Society. Enforced confinement of dissent internally to organizations frequently leads to the practice of cover-ups and unbridled reprisals against the employees who commented on the problems. Employees who complain about evils previously exposed by others are now often unprotected by the Law, but this must be corrected. Establishing the categories of and limits on protected speech is not easy. I recall that a NASA contractor employee, Jon Ransome, was punished for simply stating that a Center Director did not like the color of the primer that had just been applied to a building. The purpose of the satraps' order to discipline Mr. Ransome was to stifle dissent on more important issues, such as NASA's not performing adequate in-house testing on the Shuttle SRB's or its not having the contractor perform the tests. Let me assure you that NASA has since undergone many corrective changes.

4. Definition of Prohibited Personnel Actions. Any agency action that adversely affects an employee who has engaged in protected activity is a prohibited personnel action. A legislative effort to exclude certain punishments from the protective umbrella could sabotage the avowed goals. As an example, if "reduction in rank" were excluded as a prohibited personnel action, as was unfortunately done in the Civil Service Reform Act of 1978, abusers of power would be provided with a sacrosanct weapon with which to punish innocent employees. Other all too familiar travesties that must be encompassed by the definition are: transfers/reassignments causing hardships on the employee, perpetual temporary duty far away from the employee's residence, orders to take fitness-for-duty examinations for punitive purposes only, isolation from assigned duties, assignment to duties beyond the capabilities of the employee, reprisals against relatives of the employee, reprimands, overly frequent reassignments, revocation of security clearances, black-listing from deserved promotions, assignment to undesirable office facilities, denial of deserved remunerations, failure to renew employment contracts, denial of telephone privileges, lodging of unsubstantiated charges, abusive "fishing" investigations, lowered performance appraisals, denial of applications for deserved leave, and a host of other harassments. Some labor legislation includes similar definitions, but specific prohibited personnel actions must not be limited to the constrained definition embodied in Title II of the Civil Service Reform Act of 1978. No time limit should be set between the protected activity and the prohibited personnel action. Finally, employees should be permitted to join with citizen groups in filing complaints.

5. Protections for Those Who Perform Protected Activities. It is essential that some mechanism be legislated for effecting meaningful stays of prohibited personnel actions. This can be accomplished by assigning this function to the two entities delineated in paragraph 6. that follows. Timely suspensions of reprisals until the adjudications can be consumated will mitigate the damages. I have grave reservations that Executive Branch organizations or the General Accounting Office could or would order the necessary protective stays.

6. Remedies for Victims of Prohibited Personnel Actions. Employees and former employees who have suffered prohibited personnel actions, as defined in paragraph 4. above, should be permitted to choose one of two avenues--unfortunately not available at this time--for redress of grievances: arbitration or litigation. Allowing for only partial remedies would be inimical to fair play. All principals involved in the events must be under the jurisdiction of one of the remedial entities.

(a) Arbitration. Because of its relative simplicity and much lower cost, the common practice of engaging non-judicial third parties to settle the grievances may be chosen. "Broadly speaking, arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary processes of law. ...There are two kinds of arbitration, one under the common law and the other by virtue of express statutes." *Gates* v. *Arizona Brewing Co.* 95 P2d 49 @50 (St. Az. 1939). Two informative books on the subject are: "Arbitration in Practice," Arnold M. Zack, Editor, ILR Press, 1984; and "How Arbitration Works," by Frank Elkouri and Edna A. Elkouri, BNA, 1985. In practice, should the two arbitrators chosen by the parties be unable to reach an agreement between them, they choose another judge to assist in the determination. On June 8, 1987, the Supreme Court ruled that securities firms may impose standard agreements in their contracts with their customers that mandate arbitration in lieu of fraud suits. Although arbitration has not always been effective, it is an option with considerable potential.

(b) Litigation. The alternative to arbitration is the filing of a constitutional tort suit in the federal courts against the responsible official in his or her private capacity for compensatory and punitive damages under the *Bivens* doctrine. Our judicial system permits almost every category of U. S. citizen and some non-citizens who have been injured by federal officials in violation of the Constitution to sue those individuals, but the majority of federal employees do not enjoy this basic right. Federal prisoners, survivors of federal prisoners, state prisoners, private citizens, probationary federal employees, and foreign children are in that manner protected--but nonprobationary federal employees are not! Upon request, I will provide citations of court decisions representing each category. In accordance with the Supreme Court decision, *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971), victims of torts in contravention of the Constitution, with the exception of the largest group of American employees, are entitled to have their complaints examined by federal courts. Tired arguments against permitting federal employees to have a status equal to first-class citizens allege that to do so, would cause the judiciary to be inundated with frivolous suits. On the contrary, once a few federal officials are required to compensate their victims out of their own pockets, there will be a dramatic reduction in attacks on innocent subordinates, and a corresponding reduction in necessary damage suits. Another irrational argument against permitting federal employees to lodge *Bivens* suits is that the threat of litigation will deter federal officials in making necessary decisions. I know of one instance in which NASA officials were so isolated from opposing views that the making of intelligent decisions was impossible. I am referring to the fact that it was not the dreadful threat of law suits that deterred the NASA launch officials in January of last year from deciding to join the knowledgeable Morton-Thiokol engineers in recommending a delay of the *Challenger* launch because of the cold! Again, I reiterate that NASA has changed measurably since January, 1986.

The time is ripe for passage of laws that grant ***all*** citizens equal rights under the Constitution. A society that respects human rignts--a society worthy of the responsibility borne by its employees--must require that the administrators of those employees adhere to those same lofty standards! Indeed, it is insulting to our civil service to expect less. A hand-in-glove precept is that it is demeaning to our Constitution to grant *carte blanche* authority to federal supervisors to abuse citizens.

7. Miscellaneous Provisions.

(a) Open communications. Many commentators advising "how to blow the whistle," recommend anonymity. This irrationality is prompted by a climate in which dissent is frequently met with traumatic reprisals. If effective legislation removes the specter of retaliation, whistleblowers' names need not be kept secret. Practical considerations make it preferable to enter the names into the record. One of the most important considerations is the undeniable reality that even legitimate exposés attributed to unidentified sources suffer immeasurably from a credibility standpoint. A requirement to keep names confidential could make it difficult to prove that a *nexus* exists between the protected activity and the ensuing reprisal. Because the name of an anonymous whistleblower can surface in any number of ways, it is an inadvisable practice to shroud the act in secrecy. NASA has recently employed an independent contractor to receive and screen reports of wrongdoing from concerned NASA employees who have been unable to persuade their supervisors to take corrective action on safety concerns. The contractor then feeds the reports deemed to be valid back to the appropriate NASA manager for corrective action. (See *The New York Times*, June 5, 1987 1:1.) It follows that reprisals are likely to be unleashed on employees who naively had tried the "agency self-cleaning" approach first. The new policy, imprudent at best, unveils the disturbing fact that NASA does not trust its officials to react sensibly to expression that conceivably could prevent another major malfunction.

For further reading on this little-appreciated subject, I invite your perusal of Frederick A. Elliston's treatise on the complexities of anonymity and whistleblowing (*Journal of Business Ethics* 1 (1982), 167-177).

(b) Relieve the MSPB of Any Related Responsibility. The MSPB (Management Shenanigans Proliferation Board) and its pathetic appendage has disqualified itself from any future participation in safeguarding the interests of the United States, particularly in regard to whistleblowing. The record is replete with the MSPB's having mishandled a multitude of expression cases. What is even more tragic is that its very existence as a supposed authority on federal personnel matters gives the courts an excuse to "rubber-stamp" the MSPB decisions in multitudinous, one-line affirmation rulings. I understand that the Office of Special Counsel will burden the taxpayers until September 30. 1989, so it troubles me that I am suggesting that it be inactive until then. Still, that waste of resources is better than having it revel in the mistreatment of ethical resisters in the interim.

(c) Exhaustion of Administrative Remedies. The bill should provide that aggrieved employees be exempted from exhausting any administrative remedies, like local grievance channels, before employing arbitration or litigation. Too often, this is a futile forum, and surely does ***exhaust*** the grievants!

(d) Proof of Reprisal. Employees contesting prohibited personnel actions must offer to the arbitrators or the courts "substantial evidence" of retaliation, and not a more stringent standard.

C. Conclusions.

Legislative reform of a substantial nature, though opposed vociferously by influential, biased interests, is the only way to ensure that the federal government is a forum for the exchange of ideas for the benefit of the majority of Americans. The best deterrent to prohibited personnel actions is the individual liability incurred by abusers of power. Must most federal employees continue to suffer the stigma of treatment as non-persons in this Land of the Free by not having equal rights in federal courts?(!)

There is an urgent need for expeditious action by the Congress because our Country is beset with a plethora of ills that could be ameliorated by permitting federal employees to express publicly opinions on matters of public concern without risking ruin of their lives and the lives of their families.

Americans have sufficient cause to be outraged about the manner in which a few incompetent or dishonest officials have endangered the future well-being of our Country! I fervently hope that the Congress does not need to be additionally motivated into taking corrective action only ***after*** the advent of new calamities--such as national bankruptcy, a Chernobyl-type nuclear disaster, or another Space Shuttle tragedy!

I earnestly urge your concerted action to save the America we love.

Bill Bush

Federal Bar Association

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RESPOND TO:

July 9, 1987

The Honorable David H. Pryor
Chairman, Subcommittee on Federal Services,
Post Office, and Civil Service, Senate
Committee on Governmental Affairs
601 Hart Senate Office Building
Washington, D.C. 20510-6252

Dear Senator Pryor:

On March 19, 1987, Stanley M. Fisher, President of the Federal Bar Association, wrote to you on behalf of the Association enclosing a copy of a resolution in support of the Whistleblower Protection Act.

It is our understanding that hearings now are scheduled on that act. Accordingly, I write to ask, on behalf of the 15,000 members of the FBA nationwide, that the supporting resolution be included in the record of your hearings. A copy of the resolution, and a report which accompanied it from the FBA's Career Service Section, is enclosed.

Thank you for your consideration.

Sincerely,

Robt. C. Mueller

Robert C. Mueller
Chair, Career Service
Section

cc: The Honorable John H. Glenn, Jr.

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Federal Bar Association

Resolution No. 87 - 4

Support for Whistleblower Protection Act

WHEREAS it is unquestionably in the public interest to reduce Federal Government expenditures resulting from fraud, waste, and abuse of law;

WHEREAS protecting Federal Government employees who disclose such expenditures from reprisals is a major step toward reducing such illegality, waste, and corruption; and

WHEREAS the procedures established by Congress in the Civil Service Reform Act of 1978 to protect employees from such reprisals have proven inadequate to do so, with the resulting effects of less disclosure than otherwise might be expected and of less protection of those employees who do disclose than had been intended;

NOW, THEREFORE, BE IT RESOLVED that the Federal Bar Association supports amendment of the Civil Service Reform Act of 1978 with respect to strengthening protections for Federal civil servants who disclose information on mismanagement; gross waste; violations of law, rule or regulation; abuse of authority; or substantial and specific danger to public health or safety, by providing such employees who allege that they are victims of reprisals may seek stays and corrective action from the Merit Systems Protection Board and may appeal Merit Systems Protection Board decisions to courts without necessarily being represented in these actions by the Office of the Special Counsel;

BE IT FURTHER RESOLVED that the Federal Bar Association supports amendment of the Civil Service Reform Act of 1978 with respect to specifically defining and strengthening the authority and responsibility of the Office of the Special Counsel to protect Federal civil servants who disclose such information from reprisals; and

BE IT FURTHER RESOLVED that the President of the Federal Bar Association communicate the FBA's support of the Whistleblower Protection Act to appropriate committees and subcommittees of the Senate and House of Representatives and to other members of the Congress by such means and at such times as may be appropriate.

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REPORT IN SUPPORT OF RESOLUTION NO. 87- SUPPORT FOR WHISTLEBLOWER PROTECTION ACT

An important public interest in reducing government expenditures resulting from fraud, waste and abuse of law and authority has been thwarted by inadequate protections for Federal employees who disclose such information. Legislation has been introduced in Congress which would strengthen those protections and would permit government employees who believe that they are the victims of reprisals for disclosing fraud, waste and abuse of law, to request corrective action administratively and thereafter to appeal to the courts without depending on the Office of Special Counsel to bring such complaints on their behalf.

In 1978 Congress substantially revised the Federal Civil Service System by enacting the Civil Service Reform Act of 1978 (P.L. 95-454). (CSRA). Congressional concern over protecting taxpayers from illegality, waste and abuse found expression in the Act when Congress wrote into law that civil service "whistleblowers" should not be subject to reprisal and that those Federal managers who took such reprisals should be punished. Earlier in 1978, the Senate Governmental Affairs Committee had released a report on whistleblowing in the Federal Government which stated, "The sincere whistleblower's experience is colored by confusion, hypocrisy, and uncertainty." A Federal employee can only "attempt to correct a problem at the risk of his or her career, financial security, and reputation."

The CSRA created three institutions out of the old Civil Service Commission:

--The Office of Personnel Management, the Government's management agency, to generally administer the civil service system;

--The Merit Systems Protection Board, an independent quasi-judicial body, to hear and adjudicate employee appeals from adverse agency actions; and

--The Office of Special Counsel, the investigative and prosecutorial arm of the MSPB, to present cases involving prohibited personnel practices to MSPB.

The CSRA also established 11 prohibited personnel practices which for the first time, codified the right of employees to be free from arbitrary action.

One of the most significant of the prohibited personnel practices codified in the CSRA was the ban on specific forms of retaliation against whistleblowers. Specifically prohibited is retaliation for any disclosure of information by an employee or applicant for employment which the employee or applicant reasonably believes evidences a violation of any law, rule, or regulation; mismanagement; gross waste of funds or abuse of authority; or substantial and specific danger to public health and safety (5 U.S.C. 2302(b)(8)). For the disclosure of information, the public release of which is barred by statute or by executive order due to national security considerations, whistleblowers are still protected if they make the disclosure to the head of the agency, the Inspector General or the Special Counsel of the Merit Systems Protection Board.

Unfortunately, in the eight years of its existence the Office of Special Counsel has been woefully inadequate in protecting whistleblowers from reprisal. The purpose of this resolution is to support legislation which will specifically strengthen the Office of Special Counsel and will permit legitimate whistleblowers to seek protection when the Special Counsel will not seek it on their behalf.

A bill known as the Whistleblower Protection Act was introduced with bipartisan support in the last Congress and passed the House of Representatives by voice vote in September 1986. There was insufficient time for the Senate to act on it prior to adjournment, but early hearings were promised in this session of Congress. Although the leadership of the Senate has changed, early hearings before the Senate Post Office and Civil Service Subcommittee on the bill are expected. The bill has been reintroduced in the House as H.R. 25 in the form it passed last year, and hearings were held on March 10, 1987. It has bipartisan support and almost 60 sponsors. It has been reintroduced in the Senate as S. 508, also with bipartisan support.

Although the bills contain various procedural and substantive changes, the resolution supports the broad principles of the bills: that the Ofice of Special Counsel should be made more effective and that an employee who believes he is the victim of reprisals should have the ability to control the development of his case through private counsel. The latter can be accomplished by granting those employees the right to seek protection and redress from the Merit Systems Protection Board and subsequently from the courts, without being dependent on the Office of Special Counsel to act on the employees' behalf, which presently is the only way employees who disclose violations can be protected.

The findings and purposes of the bills are stated in Sec. 2 as follows:[1]

> (a) Findings.--The Congress finds that--
>
> (1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;
>
> (2) protecting employees who disclose Government illegality, waste and corruption is a major step toward a more effective civil service; and
>
> (3) in passing the Civil Service Reform Act of 1978, Congress established the Office of Special Counsel to provide whistleblowers (those individuals who

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[1] The stated purposes of the House and Senate bills differ slightly. The Senate version of subsec.(b)(2)(A) states that the primary role of the Office of Special Counsel is to protect whistleblowers "from prohibited personnel practices." The House bill adds a third purpose "providing that the Office of Special Counsel represent employees, former employees, and applicants for employment with the Federal Government who claim to have been subject to prohibited personnel practices."

> make disclosures described in such section 2302(b)(8)) protection from reprisal.
>
> (b) PURPOSES.--The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by--
>
> (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices;
>
> (2) establishing--
>
> (A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers; and
>
> (B) that while disciplining those who commit prohibited personnel practices may be used as a means to help accomplish this goal, the protection of individuals remains the paramount consideration.

In summary, the bills reaffirm congressional support for civil servants who blow the whistle on waste, mismanagement, or wrongdoing and provide stronger mechanisms to protect whistleblowers from reprisal. In addition, the bill strengthens the Office of Special Counsel by: (a) establishing it as an independent agency, separate from the MSPB; (b) strengthening the OSC's current power to seek stays and corrective action for employees who are victims of prohibited personnel practices and to seek disciplinary action against those who engage in prohibited personnel practices; (c) giving the OSC the power to take its cases to court if it loses before the MSPB; and (d) expanding the subpoena authority of the OSC to permit subpoenas of Government employees outside of the United States.

The House and Senate versions of the bill, while substantially the same, differ with respect to whether an employee could seek administrative review on his own behalf without first bringing the alleged reprisal to the Office of Special Counsel: The House bill would permit the employee to bring the complaint directly to the MSPB, while the Senate bill would require a 60-day waiting period to give the Special Counsel an opportunity to review and seek corrective action on the employee's behalf. The Career Service Section believes that either version is a vast and long-needed improvement of the current situation. Rather than endorse one or the other version, it endorses and recommends a resolution by the FBA covering either version and endorsing the bill's broad principles and not its specific provisions, leaving those to be worked out by the appropriate Congressional committees.

The House Committee Report accompanying last year's bill clearly demonstrates the need for Federal employees to be able to go directly to the MSPB and the courts if the Office of Special Counsel chooses not to pursue their complaints. As noted in the House report, after eight years of operation, the Office of Special Counsel has turned down more than 99 percent of the whistleblower cases brought to it, and for the last 5 years, since 1981, it has not filed a corrective action complaint to restore the job of any whistleblower (H.R. Rep. 99-859 99th Cong. 2d Sess, 17).

The House report states:

> According to studies by the Merit Systems Protection Board, the number of Federal employees who feel that they cannot safely come forward with allegations of waste or mismanagement is increasing. In 1980, 20 per cent of employees who perceived agency problems did not report them because of fear of reprisal. In 1983, that figure had grown to 37 percent. The number of employees who refrain from disclosing wrongdoing because they do not expect the disclosure to result in eliminating the wrongdoing has also grown--from 53 percent in 1980 to 61 percent in 1983. According to the MSPB studies, the primary reason that Government employees remain silent is their belief that it will not make any difference if they speak out.
>
> Since the establishment of the OSC, one Special Counsel has taught a course for Federal managers on how to fire whistleblowers. Another has expressed disdain for whistleblowers by referring to them as "malcontents" and "informants" and likening them to bag ladies and mental health patients. One Special Counsel even warned would-be whistleblowers to keep quiet or they would get their heads blown off.

(H.R. Rep. 99-859, p. 17).

The House Report continues:

> Testimony before the Subcommittee on Civil Service showed that the Special Counsel closes one-third to one-half of all its cases without meeting with the complainant and without conducting any inquiry at all. When the Special Counsel does open an investigation, OSC investigators explicitly discourage employees from presenting evidence and often refuse to contact witnesses suggested by them. Recently, the Office's top priority was to close cases and members of the staff were given quotas on the number of cases they were to close by specified

> dates. The Special Counsel routinely closes cases and advises the complainants through form letters only of the fact that the case has been closed. Often no reason is provided for the termination of the investigation. The Office has refused to share information from the OSC investigative file with the complainant, even when the file contained information important for the individual's case in another forum.
>
> The General Accounting Office (GAO) found that in fiscal year 1984 the Special Counsel conducted actual investigations for only 8 percent of individuals who requested assistance. The Subcommittee on Civil Service has been unable to find a single individual who has gone to the Office of Special Counsel since 1981 who has been satisfied with the investigation of his or her case.

(H.R. Rep. 99-859, p. 18-19).

The House Report further states:

> The Special Counsel has the responsibility of seeking corrective action for individuals adversely affected by prohibited personnel practices. If an initial investigation indicates that a reprisal has occurred, the Special Counsel should recommend to the head of the agency that the reprisal action be ended. If the head of the agency does not agree, the OSC can take the complaint to the Merit Systems Protection Board to seek enforcement of the recommendation.
>
> Again, the results have been unsatisfactory. In 1985, the GAO reported that out of the 1,500 requests for Special Counsel assistance since the OSC was established in 1979, only 16 have led to petitions for corrective action. No corrective action petition has been filed in the last four years. In fact, GAO found that the only redress the Special Counsel secured for any complainants for the two year period from August 1982 to August 1984, was to convince agencies, through informal means , to cancel the transfers of three employees.
>
> In testimony presented before the House Subcommittee on Civil Service, Special Counsel O'Conner denied any responsibility to assist wronged individuals. He maintained that his client was the merit system, and that he had

no duty to help individuals. Indeed, Mr. O'Conner referred to the victims of retaliations as "witnesses". . . .

The Office of Special Counsel has been unwilling to risk losing a case. In 1985, the Office of Special Counsel told the GAO that it would litigate on behalf of whistleblowers only if there was a 70 to 80 percent chance of winning. The 1985 annual report of the Office of Special consel said that there must be a "virtual certainty that the evidence provides sufficient facts to ensure success. . . ."

The Special Counsel has imposed settlements on complainants against their will. One witness before the subcommittee, William Tuesburg of the Department of Housing and Urban Development, characterized the Special Counsel's "success" in his case--including his unwanted transfer-- as a further reprisal. . . .

Moreover, the Special Counsel has attacked the motives of individuals who have come to him for help. Mr. O'Conner asserted in subcommittee hearings . . . that complainants he turned away have almost always lost their cases everywhere else as well. Subcommmitteee investigation showed that Mr. O'Conner's allegations were unfounded.

Given the animus recent special counsels have shown toward individuals who seek the help of the Qffice of Special Counsel, the committee determined that these individuals should have the right to pursue their own cases, without use of the Special Counsel. Under current law, individuals who allege that they are victims of prohibited personnel practices have no appeal from a decision by the Special Counsel to terminate activities on their behalf. The Whistleblower Procection Act of 1986 corrects this by providing complainants with the option of filing their own independent action before the Merit Systems Protection Board alleging a prohibited personnel practice. The determination to provide an independent right of access is not intended to cut off any right that individuals now have to seek redress of wrongs in court.

(H.R.Rep. 99-859, p. 19-20).The record fully supports the finding that government employees should have the right to pursue their own cases without depending on the Special Counsel.

No cost to the government is expected to result from this legislation, and it will likely produce substantial savings. The Committee Report accompanying last year's bill stated that its enactment would "not result in any significant additional costs to the government" (H.R. Rep. 99-859, p. 31). In addition, House and Senate statements accompanying the enactment of the 1978 whistleblower legislation expected "phenomenal" potential savings to the government by protecting and thus encouraging employees who disclose billions of dollars of fraud and cost overruns.

Given the seriousness of the problem and the momentum attained in the last session of Congress and the fact that House hearings were held on March 10, 1987, it is probable that early Senate hearings will be held on the bill, and that it will move quickly through the House of Representatives now that it has once passed that body. For that reason, a position in support of the bill is timely and the Federal Bar Association is urged to adopt a resolution supporting the bill's purpose.

Respectfully submitted,

Robert C. Mueller
Chair, Career Service Section

STATEMENT OF

A. E. FITZGERALD

MADAME CHAIRWOMAN AND MEMBERS:

THANK YOU FOR INVITING ME TO APPEAR HERE TODAY.

SINCE THE PRACTICE OF LAW FOR PEOPLE OTHER THAN MYSELF IS OUTSIDE MY REGULAR DUTIES, I HAVE NOT SUBMITTED MY STATEMENT FOR CLEARANCE TO MY EMPLOYER, THE U.S. AIR FORCE. THAT BEING THE CASE, I CANNOT SAY WHETHER MY TESTIMONY WILL REPRESENT THE VIEWS OF THE AIR FORCE OR THE DEPARTMENT OF DEFENSE.

I BELIEVE THAT IN ORDER TO PROPERLY ASSESS THE WORKINGS OF THE OFFICE OF SPECIAL COUNSEL, SO-CALLED "WHISTLEBLOWER" PROTECTION, AND THE CIVIL SERVICE LAWS GENERALLY, WE NEED TO UNDERSTAND THE ENVIRONMENT WE ARE DEALING WITH. THAT ENVIRONMENT CAN BEST BE UNDERSTOOD BY UNDERSTANDING WASHINGTON, D.C. WASHINGTON, D.C. IS ESSENTIALLY A ONE-INDUSTRY TOWN. ANYONE WHO GREW UP, AS I DID, IN A ONE-INDUSTRY TOWN, OR MILL TOWN AS THEY USED TO BE CALLED, CAN READILY UNDERSTAND THE SEEMINGLY COMPLEX GOINGS-ON IN WASHINGTON IF THEY GIVE IT A LITTLE THOUGHT. OUR MILL TOWN'S INDUSTRY IS NOT STEEL OR TEXTILES OR SOME OTHER USEFUL PRODUCT. OUR INDUSTRY IS POLITICS, AND THE LIFE BLOOD OF POLITICS IS PATRONAGE. PATRONAGE TAKES MANY FORMS. AMONG THEM ARE IMPORT QUOTAS, TARIFFS, TAX LAWS, ESPECIALLY THE SPECIAL INTEREST VARIETY, REGULATORY RULINGS OF ALL KINDS, SELECTIVE PROSECUTION, LOCATION OF GOVERNMENT FACILITIES, GRANTS, APPOINTMENTS, AND

MOST IMPORTANT, GOVERNMENT CONTRACTS. ALTHOUGH THEY DON'T TALK ABOUT IT PUBLICLY, BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES ARE PREOCCUPIED WITH THE DISTRIBUTION OF PATRONAGE IN ALL ITS FORMS. BECAUSE THIS DISTRIBUTION IS SO COMPLEX, BOTH BRANCHES PRIZE EMPLOYEES WHO ARE "RESPONSIVE" IN DISTRIBUTING THE PATRONAGE AS DESIRED BY THE DOMINANT PARTIES IN THE PROCESS.

BECAUSE THE PATRONAGE DISTRIBUTION PROCESS IS SOMETIMES MESSY AND NOT SEEN AS A FIT SUBJECT FOR FULL DISCLOSURE TO THE TAXPAYERS AND CONSUMERS, THE LEGISLATIVE AND EXECUTIVE BRANCHES HAVE BANDED TOGETHER TO PRODUCE RULES WHICH GOVERN AND STEER THE BEHAVIOR OF A CLASS OF CIVILIAN EMPLOYEES (CALLED "INFERIOR OFFICERS" IN THE CONSTITUTION) WHO DO THE DAY-TO-DAY DIRTY WORK. THESE RULES ARE THE CIVIL SERVICE LAWS AND REGULATIONS.

THE GENIUS OF THE CIVIL SERVICE QUASI-JUDICIAL SYSTEM IS ITS ABILITY TO CHANGE THE SUBJECT. A PRIME EXAMPLE IS THE SPANTON CASE. WHEN GEORGE SPANTON AND I FIRST TALKED IN MARCH OF 1982, GEORGE WAS ALREADY IN DEEP TROUBLE BECAUSE OF HIS ATTEMPTS TO SAVE MONEY. GEORGE HAD CHALLENGED THE RUNAWAY GROWTH OF CONTRACTOR COMPENSATION, ESPECIALLY EXECUTIVE PAY AND PERQUISITES, AND THE APPEARANCE OF IMPROPER CONTRACTOR ENTERTAINMENT OF HIGH-RANKING GOVERNMENT OFFICIALS, INCLUDING SOME GENERALS. AS GEORGE TOLD ME AT THE TIME, HE HAD DEEPLY

OFFENDED THE "PROCUREMENT COMMUNITY". HE ESTIMATED HIS CHALLENGE TO THE THEN ON-GOING CONTRACTOR COMPENSATION NEGOTIATIONS TO BE WORTH ABOUT $150M AT A SINGLE LOCATION. GEORGE'S CHALLENGES TO APPEARANCES OF IMPROPER ENTERTAINMENT AND GRATUITIES WERE EVEN MORE SENSITIVE. GRATUITIES, ALONG WITH THEIR BIG BROTHER - REVOLVING DOOR RETIREMENT JOBS - ARE THE GREASE THAT INSURES THE SMOOTH WORKINGS OF THE PATRONAGE DISTRIBUTION MACHINE, ESPECIALLY AMONG MILITARY OFFICERS. IN SHORT, GEORGE SPANTON HAD BECOME A THREAT TO THE PATRONAGE DISTRIBUTION PROCESS AND THE SYSTEM DEMANDED THAT THIS THREAT BE REMOVED.

MY ASSOCIATES AND I PERCEIVED THE IMPORTANCE OF THE SPANTON CASE RIGHT AWAY, BUT I WAS SPECIFICALLY INSTRUCTED BY MY IMMEDIATE SUPERVISOR NOT TO TAKE ANY "DIRECT ACTION" TO HELP MR. SPANTON, EVEN THOUGH MR. SPANTON'S IMPROVEMENT INITIATIVES COINCIDED EXACTLY WITH THE STATED OBJECTIVES OF THE SECRETARY OF THE AIR FORCE. BEING BASICALLY A GOOD, RESPONSIVE BUREAUCRAT, I DID EXACTLY AS I WAS TOLD AND AVOIDED DIRECT ACTION TO HELP MR. SPANTON. INSTEAD, I FOUND A WAY TO ASSIST HIM INDIRECTLY. I TOLD CLARK MOLLENHOFF, GREG RUSHFORD, THE PROJECT ON MILITARY PROCUREMENT AND, LATER ON, SENATOR GRASSLEY ABOUT THE SPANTON CASE. THEY THEN TOOK OVER AND CONTINUALLY SUBJECTED TO PUBLIC VIEW THE INCREDIBLY STUPID, CLUMSY, AND DISHONEST ATTEMPTS TO REMOVE OR NEUTRALIZE MR. SPANTON.

At first, the Office of Special Counsel (OSC) investigators appeared to be part of the problem in the Spanton case. When I was first interviewed by OSC investigators, they were determinately disinterested. I kept trying to give the investigators documentary evidence and they kept giving it back to me. I finally insisted that they carry away some of the documents, but never did succeed in getting these particular investigators to discuss the substance of the evidence. All they would say was that they could not see any "nexus" between the bad treatment of Mr. Spanton and his attempts to save the taxpayers money. It has been truly said that there are none so blind as those who will not see.

Prospects for the Spanton case improved greatly when Mr. O'Connor took a personal interest in the matter and assigned investigator Delbert "Chip" Terrell to the case. I believe that the personal attention and commitment of Mr. O'Connor, the diligence, skill, and boldness of Mr. Terrell's investigations, and the continuing public scrutiny were indispensible factors in the successful prosecution of some of Mr. Spanton's tormentors.

Mr. Spanton is widely believed to have "won". But, did he? Mr. Spanton, himself, was pushed into retiring before he really would have had he been allowed to follow through on his reform initiatives. His cost savings

INITIATIVES WERE LOST FROM VIEW AND SANK WITH HARDLY A TRACE AS THE SLOW MOVING INVESTIGATIVE AND QUASI-JUDICIAL PROCESS INEXORABLY CHANGED THE SUBJECT.

FURTHERMORE, MANY OF MR. SPANTON'S DETRACTORS AND OPPONENTS EMERGED UNSCATHED. I BELIEVE THAT FURTHER INVESTIGATION WOULD PRODUCE OVERWHELMING EVIDENCE THAT THOSE INDIVIDUALS CONVICTED IN THE SPANTON CASE WERE ACTING AT THE BEHEST OF MILITARY OFFICERS SEEKING TO PRESERVE THE STATUS QUO AND THAT ALL WERE ACTING WITH THE KNOWLEDGE AND SUPPORT OF HIGHER-UPS IN THE EXECUTIVE BRANCH.

IF WE ACCEPT THE DOMINANT LEGAL INTERPRETATION OF TODAY'S STATUTES AND PRECEDENTS, THE SPANTON CASE WOULD END HERE, WITH THE TAXPAYERS AND ALL THE PARTIES DIRECTLY INVOLVED IN THE SPANTON CASE, EXCEPTING OSC, AS LOSERS. THE TAXPAYERS HAVE LOST BECAUSE MR. SPANTON'S PROMISING INITIATIVES HAVE BEEN ALLOWED TO DIE. MR. SPANTON HIMSELF IS OUT OF THE GOVERNMENT. MR. SPANTON'S IMMEDIATE SUPERIORS HAVE BEEN DEMOTED OR, IN THE CASE OF MR. STARRETT, FIRED. THE BIG WINNER IS THE PATRONAGE DISTRIBUTION SYSTEM AND THOSE PARTIES WHO PROFIT FROM IT. IN ESSENCE, I AGREE WITH MR. O'CONNOR THAT THE SYSTEM HAS WORKED EXACTLY AS ITS FRAMERS INTENDED IT TO WORK.

WHILE PRETENDING SYMPATHY FOR SO-CALLED "WHISTLEBLOWERS" -- THAT IS, TELLERS OF TRUTHS EMBARRASSING TO POWERFUL SPECIAL

INTERESTS -- THE CARTER ADMINISTRATION AND ITS SUPPORTERS PULLED A FAST ONE ON THE TAXPAYERS AND THE TAXPAYERS' EMPLOYEES WITH THE 1978 CIVIL SERVICE ACT. THEY CREATED A SUPERFICIAL APPEARANCE OF PROTECTION WHILE, AT THE SAME TIME, SEEKING TO FORECLOSE MEANINGFUL REMEDIES. THE 1978 ACT IS BAD ENOUGH IN ITS LITERAL INTERPRETATION, BUT IT IS SO POORLY PUT TOGETHER THAT IT INVITES THE KIND OF OUTRAGEOUS INTERPRETATION EXHIBITED IN THE BUSH VS. LUCAS SUPREME COURT DECISION.

IN THAT OUTRAGE,

> "... THE SUPREME COURT ASSUMED THAT MR. BUSH'S CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED, AND THAT 'CIVIL SERVICE REMEDIES WERE NOT AS EFFECTIVE AS AN INDIVIDUAL DAMAGE REMEDY AND DID NOT FULLY COMPENSATE HIM FOR THE HARM HE SUFFERED ...'"

ACCORDING TO THE SUPREME COURT, CONGRESS HAD DECIDED THROUGH ITS ACTIONS THAT MR. BUSH DID NOT NEED FULL CONSTITUTIONAL RIGHTS NOR THE PROTECTIONS AFFORDED OTHER CITIZENS BY STATUTES AND COMMON LAW. AS A SUBSTITUTE, THE COURT SAID:

> "FEDERAL CIVIL SERVANTS ARE NOW PROTECTED BY AN ELABORATE, COMPREHENSIVE SCHEME THAT ENCOMPASSES SUBSTANTIVE PROVISIONS FORBIDDING ARBITRARY ACTION BY SUPERVISORS AND PROCEDURES -- ADMINISTRATIVE AND JUDICIAL -- BY WHICH IMPROPER ACTION MAY BE ADDRESSED

> ... As the record in this case demonstrates, the Government's comprehensive scheme is costly to administer ... not only in monetary terms, but also in the time and energy of managerial personnel who must defend their (disciplinary) decisions."

In other words, according to those great Americans on the Supreme Court, Congress has decided that Mr. Bush does not need the full legal protections enjoyed by other citizens including, not incidentally, convicted felons and people ordered deported for infamous crimes because supposedly he is protected in his work place by prohibitions against improper personnel practices.

This concept has a notable precedent in United States law. Essentially, the pre-Civil War slave laws were a code of prohibited personnel practices. Contrary to much anti-slavery opinion, ante-bellum slave owners did not have life or death power over their slaves. Since insubordination on the part of the slave, as with today's civil servant, was intolerable, it was permissible to have a slave die "under moderate correction", but a North Carolina law providing that punishment for "maliciously killing a slave" was the same as murder of a regular free person if it could be proved. (In practice, the master's affidavit of denial was usually enough to get him off.)

South Carolina's pre-revolutionary slave law was even more specific in specifying prohibited personnel practices, providing in part:

> "... In case any person shall wilfully cut out the tongue, put out the eye, castrate, or cruelly scald, burn, or deprive any slave of any limb or member, or shall inflict any other cruel punishment, other than whipping, or beating with a horsewhip, cowskin, switch, or small stick, or by putting irons on, or confining or imprisoning such slave, every such person shall, for every such offense, forfeit the sum of one hundred pounds current money."

Other laws stipulated minimum rations for slaves, days off, and other amenities. Louisiana, whose Code Noir was considered the most liberal of the slave laws, forbade the sale of mothers from their children less than 10 years of age and vice versa, or bringing into Louisiana any slave child under 10 years of age without its mother if the mother was living. The penalty for violating these prohibited personnel practices was a fine of $1,000 or $2,000, an enormous sum in those days, and forfeiture of the slave.

Unfortunately, none of these prohibited personnel practices were systematically monitored or strictly enforced by the

STATES. THE STATE AND SOCIETY, IN GENERAL WERE SAID TO HAVE AN INTEREST IN HUMANE TREATMENT OF THE SLAVES BECAUSE MISTREATMENT GAVE THE SYSTEM A BAD NAME. IT JUST WOULDN'T DO TO PROVIDE AMMUNITION FOR THE ABOLITIONISTS. ONE OF THE MOST SEVERE SOCIAL CENSURES WAS TO CHARGE THAT A SLAVE OWNER "DID NOT USE HIS PEOPLE WELL". EVERY NOW AND THEN IT WOULD BECOME NECESSARY TO MAKE AN EXAMPLE OF SOMEONE FOR MISTREATING SLAVES. HOWEVER, THE SLAVES THEMSELVES COULD NOT BRING ACTIONS ON THEIR OWN BEHALF. SLAVES OCCASIONALLY TRIED TO INITIATE THEIR OWN ACTIONS, AND IT APPEARS FROM MY READING THAT MANY OF THESE ATTEMPTS WERE AIMED AT PROTECTING THEIR WIVES FROM THE SEXUAL ATTENTIONS OF THEIR MASTERS. BUT ACCORDING TO THE ATTORNEY GENERAL OF MARYLAND SHORTLY BEFORE THE CIVIL WAR:

> "A SLAVE HAS NEVER MAINTAINED AN ACTION AGAINST THE VIOLATOR OF HIS BED."1/

IN SHORT, THE PROHIBITED PERSONNEL PRACTICES OF THE SLAVE CODES WERE AIMED AT PRESERVING THE GOOD NAME OF THE SYSTEM AND PERHAPS, TO SOME EXTENT, THE PRODUCTIVITY OF THE SLAVES THEMSELVES. IT WAS UNIFORMLY AGREED THAT "IT SIMPLY

1/ AS WAS NATURAL IN THOSE DAYS, ANY RIGHTS OF THE SLAVE WOMAN WHO MIGHT HAVE BEEN VIOLATED WERE NOT EVEN CONSIDERED SINCE, AS STANLEY ELKINS WROTE, "SUCH EQUIVOCAL RELATIONSHIPS WERE NEVER PERMITTED TO VEX THE LAW."

WOULD NOT DO", AS WILLIAM RHENQUIST MORE RECENTLY SAID OF "WHISTLEBLOWERS", TO ENCOURAGE DISSENT OR EVEN TO EDUCATE SLAVES AS TO THEIR RIGHTS. IT WAS SAID THAT RESULTS OF SUCH AGITATION "TENDS TO DISSATISFACTION IN THEIR MINDS AND TO PRODUCE INSURRECTION AND REBELLION". THIS SENTIMENT IS REFLECTED ALMOST PRECISELY IN THE 10 MAY 1985 GAO REPORT IN WHICH THE COMPTROLLER GENERAL ARGUES IN OPPOSITION TO FULL FIRST AMENDMENT RIGHTS FOR GOVERNMENT EMPLOYEES:

> "UNRESTRAINED WHISTLEBLOWING COULD RAISE LEVELS OF DISSIDENCE AND INSUBORDINATION TO THE POINT WHERE EFFICIENCY COULD BE AFFECTED."

INDEED. "EFFICIENCY"OF WHAT? OF THE PATRONAGE DISTRIBUTING PROCESS? THE BEST-KNOWN CASES OF SO-CALLED "WHISTLEBLOWING" HAVE INVOLVED COMPLAINTS OF OFFICIAL WASTE AND INEFFICIENCY. JUST WHAT KINDS OF DISCLOSURES DOES THE COMPTROLLER GENERAL FEAR?

IN MY OPINION, CONGRESS SHOULD ACT IMMEDIATELY TO REMEDY AND MAKE AMENDS FOR THE MISCHIEF THEY UNLEASED ON THE TAXPAYERS AND THE TAXPAYERS'EMPLOYEES WHEN THEY PASSED THE 1978 CIVIL SERVICE ACT WHICH MAY BE THE MOST COSTLY PIECE OF LEGISLATION EVER PASSED.

IF CONGRESS IN ITS WISDOM DECIDES TO AUTHORIZE A SPOILS SYSTEM ACROSS-THE-BOARD IN THE EXECUTIVE BRANCH, IT SHOULD DO

SO DIRECTLY RATHER THAN UNDER THE SUBTERFUGE OF CIVIL SERVICE "REFORM". AN IMPARTIAL OBSERVER WOULD HAVE TO AGREE THAT THE SPOILS SYSTEM IN CONGRESS WORKS AT LEAST AS WELL AS THE PHONY MERIT SYSTEM IN THE EXECUTIVE BRANCH. HOWEVER, PLEASE BEAR IN MIND THE PROFOUND DIFFERENCES BETWEEN THE TWO BRANCHES. I BELIEVE THE SPOILS SYSTEM WORKS AFTER A FASHION IN THE LEGISLATIVE BRANCH FOR TWO PRIMARY, FUNDAMENTAL REASONS: DIVERSITY AND ACCOUNTABILITY. THERE ARE AT LEAST 535 OFFICES, NOT INCLUDING COMMITTEES AND INDEPENDENT CONGRESSIONAL BODIES, WHERE A PERSON MIGHT CONCEIVABLY GET A JOB IN CONGRESS. BEING FIRED FROM ONE CONGRESSIONAL OFFICE DOES NOT NECESSARILY PRECLUDE A PERSON BEING EMPLOYED BY ANOTHER. ON THE OTHER HAND, BEING FIRED IN THE EXECUTIVE BRANCH IS TANTAMOUNT TO BLACKBALLING THROUGHOUT THE EXECUTIVE BRANCH. MEMBERS OF CONGRESS ARE ACCOUNTABLE. THEY STAND FOR ELECTION EVERY TWO OR SIX YEARS. FURTHERMORE, THEY CAN BE AND HAVE BEEN HELD ACCOUNTABLE IN THE COURTS FOR IMPROPER PERSONNEL ACTIONS, WHEREAS, IF WE ACCEPT THE ARGUMENTS OF THE DEFENDERS OF THE PRESENT SYSTEM, EVERY PETTY TYRANT IN THE EXECUTIVE BRANCH WOULD BE PRESUMED IMMUNE IN LAWSUITS BROUGHT BY WRONGED EMPLOYEES OF THE TAXPAYERS.

PLEASE ABOLISH OUR LATTER-DAY SLAVE LAWS. PLEASE AFFIRM THE TAXPAYERS EMPLOYEES' FULL CITIZENSHIP RIGHTS SO

THAT WE CAN DO THE JOB WHICH YOU HAVE INSTRUCTED US TO DO UNDER PUBLIC LAW 96303, THE CODE OF ETHICS FOR GOVERNMENT SERVICES, UNANIMOUSLY PASSED BY CONGRESS ON 27 JUNE 1980, AND SIGNED INTO LAW BY THE PRESIDENT ON 3 JULY 1980.

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July 28, 1987

Senator David Pryor
United States Senate
601 Hart Senate Office Building
Washington, DC 20510

Dear Senator Pryor:

My comments on the "Whistleblower Protection Act of 1987" follow, keyed to the sections of the Bill. I have some concluding remarks that apply generally to the legislation.

Section 1204, subsection (b)(2) is a welcome change. Current practice before the Board is for certain discovery disputes to be referred by Administrative Judges (Presiding Officials) to Administrative Law Judges. Since the presiding officials have sufficient experience to decide the ultimate outcome of the case, there is no reason to strip from them rulings on discovery disputes. The presiding officials are in a better position to adjudicate discovery disputes because they have a superior knowledge of the case in comparison to the one or two Administrative Law Judges of the Board who currently handle discovery disputes in isolation from the processing of the remainder of the case.

The Statute could use one modification: the taking of depositions is limited to persons in the United States, its territories and possessions. Civil Service appeals are heard throughout the world, at military bases, at the Panama Canal, at overseas schools. The Board should be able to direct the taking of a deposition or the answers to interrogatories by employees at any location in the world without going through complex letters rogatory or the other procedures used in the conduct of civil discovery procedures abroad.

It is unclear what subsection (e)(2)(B) is designed to accomplish. Compliance is usually left to the parties. The only exception I could foresee would be if the Office of Special Counsel were to pursue a corrective action complaint and the employee on whose behalf corrective action was sought was not a party. Then, if the Special Counsel thereafter failed to insure compliance with the corrective action order it had procured, it would seem reasonable for the real party at interest to be able to petition the Board for compliance. If that is the intent of this statutory change, I would suggest that the change be made more explicit.

Subsection (i), relating to MSPB litigation authority, may be too broadly stated. The Board should have the authority to have its attorneys enforce subpoenas (although it does not appear that this has ever occurred), and the Board should be able to defend its decisions in cases brought by the Special Counsel, when agency respondents are represented by the Department of Justice. But the ordinary rule should be that the Department of Justice should provide representation in cases when the Board is the respondent or when other agencies are respondents in the position of defending Board decisions on the merits of cases or on jurisdictional issues. It should be noted that litigating authority is closely tied to the Board's status as a party. The Hagmeyer decision mentioned in the "Section by Section Analysis" essentially states that the employing agency and not the Board is normally to be named as the respondent in the course of appellate litigation. There had been a prior practice of naming the Board as respondent in cases involving denials of counsel fees and in cases involving jurisdictional issues. Litigation of counsel fee disputes made those disputes very difficult to settle, since the Board attorney did not maintain substantial contact with the true respondents -- the employing agencies. The Justice Department traditionally has represented the agencies in Court, and litigation appears to be handled much more efficiently when the Justice Department provides representation to employing agencies. It was only by an accidental quirk of construction of the Federal Circuit's jurisdictional statute that the Board began supplying its own attorneys in the Federal Circuit for any cases. Given the Justice Department's experience in litigating appellate cases and given the Board's need to devote all of its resources to the adjudication of its internal case load, there seems no good reason to encourage the Board to become involved through its own lawyers in traditional litigation. Lawyers employed by the Board who wish experience in appellate litigation can always seek details to the Department of Justice for that purpose.

Section 1211(b) The Special Counsel should be an attorney, since he is the law enforcement officer responsible for the activities of other law enforcement personnel. Additionally, the Special Counsel should be qualified to appear in Court. Further, since the purpose of the remedial legislation is to establish something in the nature of an attorney-client relationship, it is essential that the Special Counsel be an attorney.

Section 1212, subsection (a)(1). The definition of what constitutes an employee has become exceedingly complex because the term is not well defined. Accordingly, to clarify the section, I would simply state that the Special Counsel shall protect individual against prohibited personnel practices, and rely upon the definition of a prohibited personnel practice to establish the class of protected individuals.

Section 1213, subsection (a). The distinction between disclosures in parts 1 and 2 is somewhat unclear. For example, would part 1 cover a newspaper story about mismanagement that mentions an employee's name and is then anonymously sent to the Special Counsel? Unless the Special Counsel is to be established as an ombudsman for the entire federal establishment, a kind of a supervisory Inspector General, I would suggest that the protections of the Special Counsel's office with respect to the list of disclosures be limited to the disclosures made to the Special Counsel, to Inspectors General, or to other employees designated by the head of the agency who received those disclosures, whether designated to receive them or not. Again, to avoid the confusion of what constitutes an employee, and, if it is the purpose of the legislation to expand the oversight functions of the Special Counsel, I would suggest that the designation of individuals whose disclosures are protected be changed to "any person."

Subsection 2. The requirement is that the agency investigated submit written reports only if the information transmitted to the Special Counsel originated from a former employee or applicant. There seems to be no good reason why Special Counsel should not be required to transmit reports that originate from information from other sources. For example, if a veteran in a Veterans Administration hospital, a prisoner in a federal institution, a volunteer working for one of the federal establishments, a civic organization, or an association devoted to some special interest, such as a labor union, advises Special Counsel of mismanagement, the legitimacy of the concerns of that individual or association is not diminished. Were the Special Counsel either to ignore the information or to suggest to the informant that they pursue other channels, no purpose other than frustration of the person making the complaint and delay in its investigation would be accomplished.

Subsection 3. The Special Counsel should not only transmit agency reports, but also provide with those reports substantive commentary or critique by the Special Counsel. In other words, the Special Counsel should be more than a clearing house for reports. If the Special Counsel's expertise is to be of benefit to the recipients of the reports, they should have the benefit of the Special Counsel's comments on those reports. Additionally, transmittal of all reports and comments should include the Office of Management and Budget, as well as any agency having jurisdiction over matters raised in the reports. It may occur, for example, that the HHS, with jurisdiction over the Public Health Service, is affected by some type of allegation of mismanagement or gross abuse of authority within the Veterans Administration. The HHS should receive a copy of the report and comments of the Special Counsel, if the two agencies affected by the disclosures are to be given the opportunity to jointly address them.

Subpart (i). To avoid the problem of agencies creating regulations that preclude disclosure of information, and then arguing that those regulations have the force of "law," I suggest that the phrase "specifically prohibited from disclosure by any other provision of law" be changed to "specifically prohibited from disclosure by any statute." One of the problems with this section is the impact of the Privacy Act. If information is maintained in the system of records, any disclosure may be precluded by the Act. If it is believed that clarification is needed, it may be required to expand the "routine use" provision of the Privacy Act to permit disclosure of information from record systems without subjecting the individual who makes the disclosure to either criminal liability or disciplinary action.

Section 1214(a)(2). The statement of facts and reasons required by this section is required only when an investigation is terminated. There is nothing to prevent the Special Counsel from keeping an investigation on hold indefinitely. Accordingly, the preceding section should require that all allegations be investigated and complaints issued or investigations terminated within ninety days from the time of filing of the Prohibited Personnel Practice, absent extraordinary circumstances. If it is the intent of this legislation to establish an attorney-client relationship, then clearly the complainant should have the right to review everything in the Special Counsel's file, just as any client would have the right to review the content of his counsel's file. Accordingly, there should be a provision that requires the Special Counsel, upon request, to divulge to the complainant the entire file that has been compiled with respect to his complaint. An exception should be created to the general duty of disclosure to protect information relating to national security or relating to confidential sources or ongoing criminal investigations.

Subpart (2)(A). The Special Counsel is given the authority to petition the Board for correction if, during the pendency of a stay, the agency does not act to correct the Prohibited Personnel Practice. Since the powers and functions of the Special Counsel provided in Section 1212(a)(2)(A) link the authority to seek corrective action to Section 1214, it is very important that the Section be revised so that it does not appear that the Special Counsel may only seek corrective action when the Special Counsel has also sought a stay. Special Counsel should be free to seek corrective action at any time. If, for example, personnel action has been taken in the past and constituted a Prohibited Personnel Practice, the Special Counsel should be able to seek corrective action even though there would be no point in seeking a stay of past action.

Subsection (B)(ii). The "Mt. Healthy" test is somewhat simplified. I think it would be helpful if the words were changed from "the Agency demonstrates that such personnel action was taken" to "the Agency demonstrates by a preponderance of the evidence that such personnel action was taken." That change would eliminate the usual problem in Board litigation of the Board relegating an evidentiary standard to a standard of deference to agency action, i.e., the agency action is appropriate if the demonstration is made on the basis of "substantial evidence" or some other type of appellate review such as is found at 5 U.S.C. 4302-4303.

Subpart (f) is at best unclear. The current law is no clearer. It is difficult for an agency to ascertain in some cases who precisely is under investigation for prohibited activity. Some complaints to the Special Counsel are quite broad and implicate a large number of persons. It would probably be better if the Special Counsel were given the authority to direct the agencies not to take disciplinary action against specific individuals pending the outcome of investigations, rather than leaving it to the agencies to determine who is under investigation and for what activities.

Section 1215(a)(2)(D): Concerning the use of a transcript, current Board practice is to tape record its proceedings and then to furnish copies of the tapes, at cost, to individuals who request them. The Board has determined that its practice conforms with the legal requirement of keeping a transcript, although there has been a lot of criticism of the practice by the Bar. If it is the intent of Congress to require that a written transcript be furnished to a party-respondent in an OSC disciplinary complaint case, then the statute should clearly state that a transcript shall be kept of any hearing and that a written copy of the transcript will be provided to the respondent, without cost, along with the written decision.

Section 1215(a)(4): The section that states "there may be no administrative appeal from an order of the Board" is unclear. The Board has in the past reviewed findings of its Administrative Law Judges in Special Counsel cases, and that practice should continue. Once the Board issues a "final" decision (after reviewing an ALJ recommended or initial decision), there is in fact no further administrative appeal, absent a request for reopening, a step purely discretionary with the Board. I would suggest that the first sentence of subsection 4 be deleted in its entirety.

Section 1215(c)(1)(B): With respect to actions against contractors, I suggest that rather than simply forwarding its recommendations to an agency, that the Office of Special Counsel be given the authority to file complaints pursuant to agency debarment procedures where such procedures exist, in addition to the referral authority contained in the statute. Alternatively, the statute could require the initiation of debarment proceedings by the contracting agency at the request of the Special Counsel.

Section 1216(b). Although it may not have been the intent of

Congress, the Special Counsel now has a practice, apparently founded upon the authority contained in Section 1216(b), that if individuals complain of personnel actions resulting from prohibited discrimination, the Special Counsel defers the case to normal EEO procedures administered by the agency that employs the complainant. As a practical matter, what that means is years of delay as a case proceeds through counseling, the filing of a complaint, investigation, hearing, appeal, and possible court action. Agencies and the EEOC are notoriously slow in the administration of EEO procedures. For example, in the case of the Veterans Administration, it may take three to four years just to complete the administrative process.

The Special Counsel has been authorized to seek stays on behalf of people complaining of prohibited personnel practices. That is a very valuable authority with regard to discrimination cases. The EEOC does not have the authority to issue a stay of a discriminatory personnel practice.

By reason of the Special Counsel's "deferral policy," it has given up the stay authority that Congress provided to it, thereby depriving an entire class of employees -- those complaining of discrimination -- of the ability to obtain stays of personnel actions. The result is ludicrous: an employee complaining of a termination resulting from whistleblowing obtains a stay, while an employee terminated by a racist supervisor cannot obtain a stay. The Congress established a procedure so that both employees could obtain stays, and the Special Counsel has relinquished its stay authority in the second class of cases.

For these reasons, I would suggest that Section 1216(b) either be deleted or revised and that either the statute or the legislative history contain a clear expression of intent that the Special Counsel use its stay authority in meritorious EEO cases and not simply relinquish its caseload through the process of "administrative deferral."

Section 1221: Individual right of action -- There are two basic concerns that I have. First, allowing a full range of challenges to proposals to take various actions would probably double the workload of the MSPB without any appreciable gain in result. Although the Board and the Special Counsel might find some procedure, as EEOC now utilizes, to consolidate complaints concerning proposals and the actions on which the proposals are based, it seems far simpler for both the appellant and the adjudicators to simply consider actions that have been taken, allowing, perhaps, for a petition to OSC but not an automatic appeal to MSPB concerning a proposal.

Second, with respect to subpart (i)(1), forcing an election may result in diminution of appeal rights. There is nothing in the statute that requires the Board to supply the same due process rights to an individual before it under Section 1221 as the Board applies under its present regulations at 5 C.F.R. Part

1200. For example, current Board regulations allow the appellant a right to a hearing. It is possible that the Board would seek to adjudicate direct appeals of prohibited personnel practices without hearings. For these reasons, I believe that the Statute should specify that the Board will accord the same procedures to appeals from prohibited personnel practices as it does to ordinary appeals from adverse actions. Then an election would not have the potential of resulting in a decrease rather than an increase in due process rights to the appellant.

Judicial Review. There appears to be no good reason to name the Board as respondent in any case. The Justice Department can readily promote that representation in all cases, whether they seek review on the basis of jurisdiction or the merits. Accordingly, the agency responsible for taking action should be the respondent in all cases.

With regard to the circuit in which review is sought, one of the purposes of the creation of the Federal Circuit was to centralize and therefore make more uniform personnel administration within the federal government. Diversity is helpful to the extent that it brings insight from many different judges to bear upon a particular problem arising repetitively in Board litigation. Diversity, however, also breeds some uncertainty for both agencies and employees. If the goal of the legislation is to continue the purpose of uniformity and personnel administration in the law determining civil service statutes, then the Federal Circuit should be the exclusive court for review.

I hope these comments have been of some help to you.

Yours very truly,

Peter B. Broida

PBB:jd
cc: Kimberly A. Weaver

A WHISTLEBLOWER'S CASE HISTORY

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PREFACE

This paper presents a testimony of my experiences as a fired whistleblower. It was prepared for review and consideration for possible entry into the record of a congressional subcommittee considering and formulating the whistleblowers protection act of 1987.

CONTENTS

PREFACE------------------------------ ii

SUMMARY INTRODUCTION------------------ 1

TESTIMONY OF CASE HISTORY------------ 3

ACTS OF REPRISAL AND DISCRIMINATION-- 6

COINCIDENTAL (?) HAPPENINGS---------- 8

RECOMMENDATIONS---------------------- 9

SUMMARY INTRODUCTION

I, Floyd J. Stanek, was fired as a whistleblower by the Federal Highway Administration (FHWA) in February 1985 after I wrote and distributed a paper the previous month entitled, "The Paradox of Highway Technology". This paper was written in response to a direct request from Congress for information on highway technology. My testimony on my experiences as a whistleblower is presented in this paper.

I have spent over $20,000.00 of my own funds to preserve my constitutional rights, to retain my dignity, pride and personal character, and to fulfill my obligation to respond to a request from Congress, which I consider a call to serve my country, no different than when I was called upon to serve my country during World War II. I am still over $50,000.00 in debt for personal living and medical expenses and legal fees.

I have not been employed in my profession of science and engineering since June 1986. I was able to forestall foreclosure of my home early part of 1987 only because of an eleventh hour personal loan from a close friend and neighbor. I am currently attempting to establish myself as a technical recruiter of professional personnel seeking advancement in Science, Engineering, and Computer Utilization.

During my employment with the FHWA I suffered a psychiatric illness that required weekly treatments, diagnosed and authenticated by a medical consultant to the Office of Workers Compensation Program, U. S. Department of Labor as a condition of, "Adjustment Disorder with Mixed Emotional Features and that psychiatric condition is causally related to factors of the claimant's federal employment". My marriage ended in divorce in May, 1985.

In this testimony paper, I delineate 18 acts of reprisal and discrimination which caused unbearable grievous harm during my experiences as a whistleblower. I also list several happenings which stretch the outer bounds of coincidence that occurred during that time period.

I conclude my testimony paper by offering two additional recommendations for improvement of the current nation's quagmire, known as whistleblowing.

One recommendation is to conduct an inquiry and review of grievance policies and procedures currently being practiced in the federal agencies to determine as to why initial disclosures of waste, abuse, and fraud are seldom reviewed and resolved internally. In my testimony paper, I indicate what I perceive to be the probable cause based on my experiences as a whistleblower.

The other recommendation is that the U. S. Merit Systems Protection Board and the Office of Special Counsel thereof, both should be abolished. My experiences with the current practices of these offices has left no doubt in my mind whatsoever that they function and operate only as a kangaroo court set-up from day-one to day-end, which never seems to arrive. In this testimony paper, I explain how the kangaroo court operated in my case.

WE WHISTLEBLOWERS OF AMERICA WANT OUR

CONSTITUTIONAL RIGHT TO A TRIAL BY JURY.

I stand prepared to answer any questions under oath before any congressional subcommittee or to the news media on any parts of this testimony paper.

TESTIMONY OF CASE HISTORY

My name is Floyd J. Stanek. I live at Bryans Road, Maryland. I have three engineering degrees. After a rewarding and satisfying professional career of over ten years of university teaching, and another fifteen years in conducting research for the advancement of nuclear and aerospace technologies, I became employed with the Federal Highway Administration (FHWA) as a Highway Research Engineer in 1972.

I was fired as a whistleblower by that agency in February 1985 after I wrote and distributed a paper the previous month entitled, "The Paradox of Highway Technology". This paper and a previous paper distributed in 1984 entitled, "Two Decades of Highway Design", were written in response to a direct request from Congress for information on highway technology, primarily and specifically as to why an additional five cents a gallon federal gasoline tax was required to restore the nation's deteriorating highways. This is my testimony on my experiences as a whistleblower.

Unknown to me at the time, these activities began in March 1974 as it does for all dedicated and concerned public servants who eventually become known as whistleblowers. That is, with the asking of simply, routine questions, such as; Why is this being done this way? Instead of receiving the answers expected, whistleblowers, totally unprepared and unsuspecting, suddenly find themselves fighting for survival in a swamp of reprisals, and the questions remain unanswered.

Unfortunately this is where the similarity ends among individual case histories, when one attempts to seek a common denominator or pattern for corrective action to protect and assist whistleblowers. Hence, the remaining testimony consists of specifics extracted from my particular case only.

In my particular case, one of the disturbing conclusions I came to during the early years of my employment with the Federal Highway Administration was that highway technology was, and still is, ten to fifteen years behind modern technological times. One of the initial questions I asked was as to why so many engineers and scientists with advanced degrees and years of experience employed in the Offices of Research and Development of the Federal Highway Administration were not being fully utilized nor permitted to use their expertise in applying advanced scientific and engineering principles for the advancement of highway technology, as many had and were able to do for the advancement of nuclear and aerospace technologies.

I asked this question directly of the Executive Administrator of the Federal Highway Administration, who at that time was Lester Lamm. Mr. Lamm clearly stated to me that he had no particular responsibility or concern because he had no responsibility whatsoever in the changing of national priorities during the latter sixties and early seventies that created, in part, the situation.

Similarly, when I submitted a written list of suggestions and recommendations for the advancement of highway technology with proper application of advanced technology, it was never acknowledged. It was totally ignored, even though it was previously requested and assured by the Director of the Office of Research, Mr. Charles Scheffey that such a list would receive acknowledgment and serious review and consideration if submitted in writing.

Ironically, many of the suggestions and recommendations I made at that time still remain unresolved and were reflected, unknowingly at the time, in my paper, "Two Decades of Highway Design", written a decade later.

Initially, I did not recognize the subtle acts of reprisals that were being instigated against me, such as not being invited to attend and participate in technical staff meetings and seminars, serve on technical committees or go on travel as many other employees at my level were. I was directed to attend training sessions on skills which I had known and practiced for over twenty years previously. At the time, I accepted them silently for what they appeared to be, childish acts of incompetence.

I began to realize and recognize some of the reprisal acts that were deliberately being directed against me in 1981, when I questioned the abusive administrative acts of improprieties I was being directed to perform by my immediate supervisors, William Kenis and Richard McComb, regarding a research contract awarded to the University of Illinois for which I was the contract manager. When I attempted to submit the issues in dispute to the contracting office for proper authoritative review and resolution, I was relieved of my duties as contract manager. As a consequence, among other improper acts, funds totally $140,000.00 were diverted to perform studies not authorized in the original contract.

Later, I received a letter of reprimand for writing and submitting a technical discussion paper raising questions on a technical paper being presented by the Portland Cement Association, a private special-interest organization, at the 1982 conference of the Transportation Research Board. This national conference is held annually and is supported by the Federal Highway Administration with the specific purpose to provide an open public forum for discussion of just such technical issues.

Without any action or initiation on my part, the letter of reprimand made the New Your Times in 1983 and Jack Anderson's column in early 1984. Eventually, it received the attention of the Investigation and Oversight Subcommittee of the House Committee on Science and Technology, at the time chaired by Congressman Gore, now Senator Gore. This led to the subsequent invitation and request to meet with the Subcommittee Chief Counsel and Staff Director, Mr. Robert B. Nicholas. The FHWA required me to use personal leave to keep this appointment.

As a result of this meeting, I wrote and distributed a paper entitled, "Two Decades of Highway Design".

I was suspended for two weeks in June 1984 for using government postage to mail the paper to various officials of the highway community, including the Administrator of the Federal Highway Administration, Mr. Ray Barnhart.

I wrote and distributed my paper, "The Paradox of Highway Technology" on January 3, 1985. After leaving work on January 9, several members of FHWA management entered my office and removed three word processing storage discs. On January 11th, I was informed that I would not be permitted to attend the annual conference of the Transportation Research Board, January 14-17, 1985. On January 18th I received the proposal to remove with six charges based primarily on 83 pages of typed documents that were extracted from the three disc removed from my office files. As was testified and confirmed during the hearings before the Merit Systems Protection Board (MSPB), 26 pages dealt with regular internal business, 14 were to transfer information and communicate with members of congressional staff, 22 were related and associated with the preparation and distribution of the Paradox paper including a mailing list, 18 were duplications or slight variations of previous recordings, and 3 (only) were for personal use.

The six charges cited against me to affect my removal, consisted of the following: (1) Unauthorized use of Government Property (the word processor), (2) Conduct Demonstrating Untrustworthiness and Unreliability (based solely on the written notice informing the Associate Administrator of the 3 disc that were stolen from my office files after I left work on the 9th), (3) Conducting Personal Affairs While in Official Pay and Duty Status, (4) Solicitation of a Loan from a Person who has interests which may substantially affect Performance, (5) and (6) were based on the contents of my Paradox paper. Charges 2, 3, and 6 were dismissed by the MSPB Presiding Official, William C. Jenkins.

The decision of the MSPB was upheld with differing reasons and arguments by a three Judge panel before the U. S. Court of Appeals for the Federal Circuit.

The majority Judges, Friedman and Nichols, cited two analogies to sustain their decision. One was that use of the word processor was analogous to using a government vehicle on the public highways for personal business. The other was that offering an alternative procedure in my paradox paper for determining and defining the nation's highway research needs was analogous to, "Working for General Motors while advocating Chrysler products".

The minority Judge, Baldwin, found that, "There can be no doubt that at least some of the agency action has been in response to Dr. Stanek's protected activity." (emphasis added)

He then cited only the letter in which I requested financial advise to support the majority's decision, failing to acknowledge that no loan, monies, or favors of any kind were ever received or exchanged. In other words, the minority judge sustained my removal only on what he erroneously perceived was the intent of my letter, and not on what actually occurred or happened as a consequence of the letter.

ACTS OF REPRISAL AND DISCRIMINATION

The following list delineate some of the acts of reprisal and discrimination which have caused unbearable grievous harm during, and subsequent to my employment with the FHWA.

1. Denied full time employment for over 30 months. During this time period I was paid for a 38-hour work week only.
2. Denied promotion above grade GS-13, even though I was registered with the Office of Personnel Management for Grade 15 and above, during entire period of employment with the FHWA.
3. Mismanagement and tampering of contents of documents entered in my Official Personnel File.
4. Fourteen hours AWOL for medical treatments received for a work related injury.
5. Suspended for two weeks, supported in part with the AWOL in reprisal act 4, charged six months previously.
6. Falsification of internal document reflecting on job performance, and intercepting interagency mail.
7. Intentional infliction of emotional distress by issuing and delivering letter of reprimand on the day I returned to the office after attending the funeral of my son-in-law, age 35.
8. Failure by the Office of the Inspector General to provide a timely copy of their findings of grievance filed and reviewed 15 months previously. Copy was provided only after a Freedom of Information Act request was filed in my behalf by my attorney, J. Robert Steelman.
9. Denied copy of document discovered under the Freedom of Information Act, specifically earmarked for reproduction and delivery in accordance to administration instructions imposed for conducting initial screening review and identification.
10. Falsely accused by Chief of General Law Division, Hugh O'Reilly, in letter to attorney that the disappearance of the FOIA document in 9 was my responsibility.

11. Failure by the Office of Personnel to take any action or provide procedural instructions to resolve complaints and concerns regarding the University of Illinois contract and the letter of reprimand, for over 19 months after the complaints were submitted, only after a review of the concerns was requested of the Office of the Inspector General.

12. Failure by the Director of the Office of Research, Charles F. Scheffey, to render any final decision on written complaint regarding mismanagement, abuse, and diversion of funds by two immediate supervisors (William Kenis and Richard McComb) regarding a research contract awarded to the University of Illinois. Prior to the complaint I was the official contract manager and liaison contact with the FHWA Office of Contracts and Procurement.

13. Distortion of the truth and facts by the Director of the Office of Research in his capacity as Official Grievance Official for reconsideration of the letter of reprimand, which he subsequently sustained, over seven months after the request was submitted, only after a review of the grievance was requested of the Office of the Inspector General.

14. The issuance of misleading informal oral instructions by the Presiding Official, William C. Jenkins, of the MSPB prior to the hearings in that he was going to confine the hearing to the merits of the six removal charges only, and WOULD NOT go into the merits of any of the appellant's past disciplinary record.

    But then in his final decision, the Presiding Official affirms the removal on the three charges he sustained and on the "appellant's past disciplinary record".

15. Failure by the Office of Special Counsel to record or initiate any corrective action or recommendation of any disciplinary action against FHWA manager in the Office of Personnel, Mr. Bernard Glenn, who intimated one of appellant's principle witness, Mr. George Ring, just a few minutes before Mr. Ring was to take the witness stand during the MSPB hearings.

16. Two FHWA employees (William Bralove and Paul Teng) whom I considered to be close trusted daily professional colleagues, suddenly claimed a loss of memory when questioned by an Official Fact Finder designated by the Executive Director for reconsideration of the two-week suspension.

17. The withholding of vital medical evidence dated January 28, 1985 by the Office of the Worker's Compensation Program (OWCP) of the U. S. Department of Labor regarding my claim filed with that Office in June 1983. This evidence was not made available until February, 1986, seven months after the MSPB hearings where it would have made a very significant difference in the evidence presented on the status of the work related medical claim before the OWCP.

18. Failure by the FHWA General Law Division to provide any acknowledgment or take any action on a list of 52 topics I proposed be reviewed by an internal review peer panel of about eight members representing seven offices. The list was requested by a staff attorney of the Division when I first orally presented by proposal for a panel review.

COINCIDENTAL (?) HAPPENINGS

The following is a list of happenings which stretch the outer bounds of coincidence that had occurred during my experiences as a whistleblower.

1. Each of six top level FHWA managers who are known to have contributed to the building of the false and unfounded case that was subsequently used to terminate my employment, received a $10,000.00 cash aware as FHWA's Presidential Rank of Meritorious Executive established under the Civil Service Reform Act of 1978, during the four-year time period, 1981-84.

   The six managers are: Lester Lamm, Executive Director before being appointed Deputy Administrator; Richard Morgan, Executive Director; Daniel Markoff, Associate Administrator for Administration; Joseph O'Connor, Associate Administrator for Right-of-Way and Environment; Edwin Wood and David Phillips, former and present Associate Administrator for Research, Development and Technology, respectively.

2. Two FHWA Office Directors, Richard Hay and Robert Betsold, who testified against me during the MSPB hearings were awarded the Senior Executive Service (SES) Performance Award for fiscal year 1983. According to Regulations of the Office of Personnel Management (OPM) the average SES award is 10% of the base salary.

3. Two FHWA employees who were cooperative and helpful during attempts to resolve internal grievances, were suddenly employed or reassigned elsewhere, when I inquired of their whereabouts for completion of a task that had been initiated jointly.

4. The initial rejection by the Office of Workers Compensation Program (OWCP), U. S. Department of Labor of my medical claim 15 days after my employment with the FHWA was terminated. And then the same office vacating the decision of rejection on February 4, 1986 at which time the medical evidence in reprisal act 17 dated a month before my removal, was made available along with additional new medical evidence dated November 27, 1985, both of which were generated by OWCP's medical consultant.

RECOMMENDATIONS

I strongly support the set of recommendations compiled and presented by Mr. Edward E. Wright, Esq. in behalf of a coalition of us whistleblowers. I am pleased to have had the opportunity to participate in the formulation of those recommendations.

In addition to those recommendations I respectfully request to have entered into the record the following two recommendation based on my personal experiences as a whistleblower, during which time I was required to walk thorough the house of horrors by day and sleep in the house of nightmares by night.

1. Conduct inquiry and review of grievance policies and procedures currently being practiced in the federal agencies. Particularly to determine as to why initial disclosures of waste, abuse, and fraud are seldom reviewed and resolved internally.

   Supporting statement: The ineffectiveness appears to be due to uncoordinated fragmentation among the various grievance offices as they currently exist in federal agencies. For example, what is the correct identification and legal definition of any one of the 18 acts listed in the Acts of Reprisal and Discrimination Section? Is it an act of, (1) reprisal, (2) discrimination, (3) harassment, (4) Prohibited Personnel Practice, or (5) a violation of the law?

   This is the type of identification and definition that whistleblowers must make and substantiate before being able to formally request and receive a review by the appropriate investigative office for authoritative resolution and correction, such as, the MSPB, the Office of Civil Rights, the Office of Special Counsel, the Office of Personnel, the Office of the Inspector General, or the General Law Office, to name a few.

   In this context, I wonder what role congress may have had over the past several decades in creating and mandating some of these offices? Particularly, as to how the functions of some of these offices may currently overlap or conflict with functions performed, or are not currently being performed properly, by offices created and mandated previously?

   We must seek and search for a probable cause of the problem, and not just attempt to provide a remedy to ease the pain and suffering caused by the problem.

2. The Merits Systems Protection Board (MSPB) and the Office of Special Counsel (OSC) thereof, both should be abolished.

Supporting statement: As stated in the Summary Introduction, the MSPB and OSC function and operate only as a kangaroo court setup. The manner in which the kangaroo court operated in my case is indicated in reprisal act 14 (page 7) and also by the majority Judges of the U. S. Court of Appeals citing unrelated analogies to support their decision, rather then permitting their decision to stand on the merits of the evidence only (bottom page 5).

Additionally, since I had provided assistance to a congressional subcommittee the Presiding Official found that , "the agency bears a heavy burden of demonstrating that appellant's paper adversely affects its effective fulfillment of its responsibilities to the public." But nowhere in the written decision does the Presiding Official show how this criteria was met by the agency.

The two biggest cop-outs in this administrative judicial process are "preponderance of evidence" and "insufficient evidence". I have both in my case. These two seemingly contradictory terms become synonymous when it is recognized and accepted that they are derived from, and based on "selective evidence".

An hence, any further appeal of a decision based on evidence selected by only one presiding official sitting through three days of hearings for which only a taped record is required and a typed transcript of the sworn testimony is not provided, is meaningless and worthless, causing only unbearable additional costs and mental anxiety.

Justice would be far better served if a panel of judges were required to sit through the three days of only-taped-recorded testimony, rather then to sit in judgement after the fact on evidence previously screened and selected by one Presiding Official.

WE WHISTLEBLOWERS OF AMERICA WANT OUR

CONSTITUTIONAL RIGHT TO A TRIAL BY JURY.

A GOVERNMENT OF THE PEOPLE AND

FOR THE PEOPLE MAY PARISH FROM THE EARTH

IF THE PUBLIC TRUST IS NOT RETAINED

BY THE PEOPLE ENTRUSTED TO GOVERN.

THANK YOU.

A SURVEY OF WHISTLEBLOWERS:
THEIR STRESSORS AND COPING STRATEGIES

by

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March, 1987

Whistleblowing is a complex phenomenon that appears to be occurring with greater frequency. While much has been reported about individual whistleblower cases, we sought to identify common experiences or common characteristics of whistleblowers in an effort to assist those who work with and on behalf of whistleblowers.

Many persons have helped to make this project successful. Our sincere thanks to those who helped us to gather names and addresses of whistleblowers, those who reviewed the questionnaire for completeness and clarity, Louis Clark for his encouragement, Cathy Haynes for typing the several versions of the survey form, and our daughter Beth for assistance in collating and mailing and data encoding. Most importantly we thank those whistleblowers who took time to participate in the survey by sharing so much of themselves with us. We know that for many reliving their experiences was quite painful. Many also provided us with supporting documents and information; some thanked us for "caring enough to ask" for the information. To all of, you are to be commended and rewarded for your activity!

Contained in this document is a summary of our research findings. We hope that it will lead to further understanding of the whistleblowing experience.

A SURVEY OF WHISTLEBLOWERS: THEIR STRESSORS AND COPING STRATEGIES

In an effort to understand the commonalities of the whistleblowing experience, questionnaires with cover letter and return postage were mailed to a sample of 233 whistleblowers in the Spring of 1986. Of that number, 15 were returned due to incorrect addresses, 2 declined to participate because of pending litigation, and 87 questionnaires were completed and returned. Three, however, were received too late to be included in the data analysis although the open-ended responses to items were included. The response rate, then, was 40%.

The available sample represented individuals identified as whistleblowers in private industry and government. Names were gathered from a variety of sources, primarily whistleblower support groups and other whistleblowers. In the absence of any type of roster from which to sample, this nonprobability sampling method was used. Although the results of this survey come from a convenience sample, we do believe that the sample is representative of known whistleblowers.

Those responding to the survey ranged in age from 28-72 years with a mean age of 47 years (SD = 10.3). Almost two-thirds (73%) were male. Twenty-five (30%) had been employed in the private sector with 57 (68%) employed by the government (49 Federal, 8 city or state). Two respondents did not indicate whether they had been in the public or private sector. At the time of the whistleblowing, 44% were in professional positions and 24% held managerial positions. Included in the sample were those in positions/professions such as attorney, physician, nurse, engineer, electrician, secretary, truck driver, financial officer, and librarian. Ten respondents (12%) were in the military at the time of blowing the whistle.

For most (63%) the whistleblowing episode reported occurred after 1980. Overall, at the time of the whistleblowing, respondents tended to be between 39 and 43 years of age. Those in private industry, however, tended to be younger (33-40 years) as compared to those in government (40-45 years). They had been employed at the firm/agency for an average of 6.7 years prior to the whistleblowing. Almost three fourths (74%) had been there 10 years or less and one-third (32%) had been there two years or less. It appears that whistleblowing tends to occur when the employee has been at a firm/agency between 5 and 8 years.

Over half reported exposing abuse (54%) followed by fraud (47%), waste (44%), corruption (41%), safety (16%), and other (5%). Activities exposed varied and included violation of federal law, misuse of public funds, falsifying of documents, mismanagement, misuse of Federal facilities, questionable research activities, excessive spending, and censorship. They dealt with legal, technological, and personnel matters as well as environmental and safety issues. When asked to attach a dollar amount to the waste, fraud, or abuse exposed, 36 respondents did so with 25 of the 36 indicating the amount exceeded $1 million.

How Did They Blow the Whistle?

Over half (57%) reported blowing the whistle in person. The remainder used the telephone (22%) or mail (22%). Only 21% of the sample took their action anonymously. (note: Because these individuals are in the sample, one can assume that at some point in the process the anonymity was broken. Those who managed to remain anonymous are not in the sample and represented by these results, of course.) Table 1 indicates to whom respondents first blew the whistle. It is interesting to note that over half (54%) approached someone within the firm/agency rather than going to the media or to Congress. Included in the "other" category are the Inspector General, EEO officer, Attorney General, Nuclear Regulatory Commission or Secretary of State, all of whom could be considered internal routes as well. These results are counter to those individuals who speculate that the whistleblower is motivated by a desire for publicity, Although the specific route varied, the choice of

Table 1. To Whom the Waste, Fraud, Abuse or Corruption Was First Reported

To Whom	Number	Percent
Immediate supervisor	30	36.6
Head of firm/agency	14	17.1
Newspaper/Radio/Press	11	13.4
Hot Line	6	7.3
Congressional Representative	4	4.9
Government Accountability Project	1	1.2
Other	16	19.5

an internal versus external route as a strategy for whistleblowing was the same for private and puclic sectors. Further, it did not vary based on age or gender of the whistleblower.

For 80.5% of the sample, the initial action was considered unsuccessful and they subsequently used other avenues, primarily external routes. Most frequently whistleblowers turned to a congressional representative (20%), the press (12%), the next level supervisor (12%), or an attorney (12%). Others mentioned the Government Accountability Project, Office of Special Counsel, Civil Service Commission, OSHA, the union, or "everyone I could think of." It's important to note that those who choose to 'go public' in whistleblowing have already tried working within the system and have found their efforts to be unsuccessful for the most part.

Retaliation Experienced by Whistleblowers

All but one respondent reported experiencing retaliation which they attributed to their whistleblowing. That one individual merely indicated that "nothing could be proved." For the rest, however, retaliation occurred in several forms (Table 2) with those who had been employed longer experiencing more retaliation (r=-.19). Generally the retaliation can be categorized as harassment or job-related. For example, harrassment came from superiors (82.1%) as well as from peers (53.6%) and included verbal harassment and abuse, telephone and activity monitoring, denial of sick leave request, or being

Table 2. Retaliation Experienced by Whistleblowers.

Retaliation	Number	Percent
Harassment from superiors	69	82.1
Monitoring of activities	58	69.0
Removal of job responsibilities	53	63.1
Loss of job	50	59.5
Harassment from peers	45	53.6
Change in type of position	37	44.0
Monitoring of office telephone	32	38.1
Demotion	26	31.0
Legal action	23	27.4
Psychiatric or medical referral	22	26.2
Decrease in salary	14	16.7
Forced retirement	12	14.3
Sexual harassment	11	13.1

ignored. Job-related retaliation included demotion, firing, and forced retirement. Some harassment differed between those in private industry and those in government. Whistleblowers in private industry were more likely to loose their jobs (84% private versus 49% government) while those in government were more likely to have job responsibilities removed (75% versus 40%), office telephone monitored (47% versus 16%), forced retirement (19% versus 0%), or sexual harassment (18% versus 4%).

Retaliation did not differ between males and females, nor did the extent of retaliation appear to be related to the age of the whistleblower. Younger employees, however, and those employed a shorter time prior to whistleblowing tended to experience loss of job and monitoring of activities.

Resources Used by the Whistleblower

A variety of resources were used by whistleblowers to help them to cope with the results of their activity (Table 3). Most sought legal advice and 63.1% initiated legal action of some sort while 20.2% had legal action brought against them. Contact with other whistleblowers, the Government Accountability Project (GAP), and psychological counseling were other resources used by over half of the respondents. These same resources were rated to be the most helpful although it should be noted that they were still only moderately helpful according to respondents. (Note: Some of these resources are available only for Federal employees.)

Table 3. Resources Used by Whistleblowers

Resource	Percent Used	Helpfulness Rating[1]
Legal advice	90.5	2.3
Contact with other whistleblowers	79.8	2.4
Government Accountability Project	60.7	2.5
Psychological Counseling	57.1	2.0
Medical Consultation	47.6	1.6
Merit System Protection Board	45.2	0.6
Office of Special Counsel (OSC)	42.9	0.8
Project on Military Procurement	13.1	1.2

[1] 0 = Not at all and 5 = Extremely Helpful

Effects of the Whistleblowing Episode

The events surrounding the whistleblowing episode were considered very stressful for the whistleblower (mean ratinge 8.0 where 9 = Extremely Stressful) who felt only a moderate degree of control over what was happening. Whistleblowers considered themselves to be in good physical and mental health prior to whistleblowing and as a result of the stress experienced both physical and mental health were reported to have deteriorated to the "modest" level. It would appear that the length of time involved in resolving the events surrounding the whistleblowing was a factor. For 37%, resolution took an average of 3 years; for the remaining 63%, resolution has not yet occurred despite the 5 years that have passed since the actual whistleblowing.

The results and stressfulness of the whistleblowing not only affected the individual, but understandably affected the spouse and, to a lesser extent, the children also (Table 4). The most negative effect was on the emotional state followed by social activities and physical health. Even spiritual well-being was perceived as being somewhat negatively affected. (Note: Seventy percent of the whistleblowers were married at the time and 61% had children.)

Table 4. Overall Effects of Whistleblowing on Self, Spouse, and Children

	Effect	Self	Spouse	Children
	+	4.8[1]	5.1	5.9
Physical Health	None	15.7	32.2	45.1
	-	79.6	62.7	49.0
	+	8.4	5.1	2.0
Emotional State	None	6.0	9.5	29.4
	-	85.5	85.4	68.6
	+	6.0	3.4	5.9
Social Activities	None	22.9	27.1	45.1
	-	71.1	69.5	49.0
	+	37.8	18.6	5.9
Spiritual Well-Being	None	17.1	33.9	52.9
	-	45.1	47.5	41.2

[1] Percent reporting

Table 5 provides a listing of what the whistleblower and spouse are reported to have experienced. Feelings of powerlessness, anxiety, anger, isolation, and depression were accompanied by changes in sleep, eating, and excerise patterns for both. Financial concerns resulting from loss of job or forced retirement were common also. For some, the whistleblowing led to loss of home (17%) or bankruptcy (8%) and 15% view divorce to be a result. Almost 10% reported they had attempted suicide with others indicating they had considered it.

Table 5. Symptoms Reported by the Whistleblower for Self and Spouse

Symptom	Self (n=84)	Spouse (n=59)
Increased alcohol use	26.5	13.6
Increased drug use	18.1	10.3
Increased smoking	24.1	20.3
Lack of exercise	54.2	28.8
Weight loss	28.9	8.5
Weight increase	37.3	33.9
Loss of sleep	77.1	50.8
Increased sleep	13.3	3.4
Feelings of panic	50.6	25.4
Sense of powerlessness	81.9	33.9
Loss of financial credit	44.6	20.3
Increased anxiety	80.7	69.5
Increased anger	79.5	54.2
Attempted suicide	9.6	1.7
Psychosomatic illness	22.9	6.8
Withdrawal	45.8	16.9
Paranoia	34.9	15.3
Depression	73.5	35.6
Feelings of isolation	73.5	30.5
Feelings of being misunderstood	71.1	22.0
Loss of financial independence	54.2	26.7

Interestingly, those who experienced harassment from their peers for being a whistleblower reported significantly more stress connected with the episode. It would appear that a support network within the work environment is critical to minimizing the stress. Whether or not the whistleblower attempted to be anonymous was another factor related to the stressfulness. Those who attempted to be anonymous reported a higher level of stress, consistent with the increased extent of retaliation they experienced. This finding would suggest that a mechanism for whistleblowing be developed that would protect the anonymity of those who desire it. Anonymity would serve also to decrease or eliminate the harassment from peers associated with the increased stress.

When asked to list the three most negative outcomes of their whistleblowing, the financial burden and/or loss of job topped the list (54%). Cited second most often was the emotional strain on self (21%) or family (19%), along with the ridicule from others (17%). Loss of promotion or career change was listed by 17%. Included in this latter group are a number of whistleblowers from the nuclear power industry who indiated they were blackballed from the industry as retaliation. Some mentioned having lost faith in others (7%), the government (6%), or the judicial system (5%). Two even reported having action taken again their lives.

Ways of Coping

Coping consists of cognitive and behavioral efforts to overcome, reduce, or tolerate the internal and environmental demands in stressful situations. The revised Ways of Coping scale[1] was used to determine the strategies whistleblowers used to cope. The items measure problem-focused coping and emotion-focused coping. Problem-focused coping refers to efforts to deal with the source of stress by changing one's own behavior and/or by changing environmental conditions. Emotion-focused coping refers to efforts to reduce or tolerate emotional distress.

In general, adults tend to use relatively more problem-focused coping in work situations and those situations they believe they can change and to use more emotion-focused coping in health situations and ones they appraise they must accept. Coping flexibility involves using a variety of coping strategies over time with confrontive, denial, and escape/avoidance techniques generally leading to poor outcomes if used excessively.

Among this sample of whistleblowers, problem-focused and emotion-focused strategies were used in approximately equal amounts, suggesting flexibility. Although they tended to confront the situation rather than distance themselves from it, they also used positive reappraisal and exercise of self-control. The strategy used relatively most frequently was to seek social support.

The length of time employed at the firm/agency prior to whistleblowing was not associated with coping although age was. Younger workers tended to be more likely to accept responsibility, attempt to distance themselves, and use escape/avoidance strategies.

What Motivates the Whistleblower

A number of personality and environmental factors undoubtedly interact to motivate the whistleblower to action. Specifically measured in this survey was the ethical ideology. The Ethics Position Questionnaire[2] measures approaches to moral judgment using two factors. The first is the extent to which an individual rejects universal moral rules in favor of relativism. The second dimension is the degree of idealism. Based on these two factors, individuals are categorized as adopting one of four approaches to making ethical judgments: situationism, absolutism, subjectivism, and exceptionism. Whistleblowers surveyed tended to be in two of the four groups (Table 6). Generally, those responding believe moral codes are universal rather than relative. For the absolutists, acts are judged as moral through comparison to the universal moral rule. They believe that the best possible outcome can always be achieved by following universal moral rules. Exceptionists, however, believe that absolute moral principles are important but the rules must be applied in a way that produces the greatest good for the greatest number. As might be expected, situationists tended to be the younger whistleblowers.

Table 6. Ethical Ideologies of Respondents

	Relativism	
Idealism	High	Low
High	Situationists 10.8%	Absolutists 45.9%
Low	Subjectivists 9.5%	Exceptionists 33.8%

Would They Blow the Whistle Again?

In spite of the retaliation experienced and the stress which resulted, when queried as to how likely they would be to blow the whistle again, only 16% responded "not at all" as compared to 54% who responded "extremely likely." The remainder were evenly divided between being like and unlikely. The likelihood was somewhat less for those who experienced harassment from peers, legal action, and change in the type of employment position. Increased likelihood was related also to the increased use of problem-focused coping strategies. Furthermore, likelihood was unrelated to factors such as ethical ideology, age, length of time employed, how stressful the situation was perceived to be, or whether the individual was in the private or public sector.

One factor which was associated with the likelihood of blowing the whistle again was telephone monitoring with a record kept of all numbers called. Respondents indicated they would be significantly less likely to blow the whistle under these conditions and perceived it very likely that the information from monitoring would be used against them. In this increasingly technological environment, such monitoring could impact on whistleblowing in the future.

Positive Results of Whistleblowing

Did anything positive occur as a result of the whistleblowing? Only 20% indicated that changes were made as a result of their activity. Many of the 20% cited personnel changes: complete management change, personnel practices corrected, persons transferred or replaced or not reappointed, department restructed. Others cited changes in policy, indictments, improved safety, or official investigations by the FBI or NRC. Almost all respondents mentioned a positive outcome from the experience for them personally, however, Mentioned by 34% was an increased sense of self-respect or self-worth for having done what was right. Almost an equal number (32%) mentioned having made the workplace healthier or safer or having saved the taxpayers money. For some the event provided an opportunity to make new friends (11%), grow in the spiritual dimension (11%), further define their values (8%), or increase their commitment to family (5%). Several (11%) mentioned a career change or getting out of the government as a positive outcome.

Advice to Potential Whistleblowers

Don't do it! That advice was offered by almost a third (29%) of the respondents. They also warned to expect retaliation, financial loss, and mental anguish (45%). That advice must be tempered, though, by advice to listen to your conscience (20%), document everything (31%), get support from other whistleblowers (14%), know your legal rights (14%), plan your actions carefully (12%), and do it anonymously or get someone else to do it for you (13%). Those in the survey seem to be telling others to be aware of the consequences and then do what is right for them, availing themselves of whatever support systems are available.

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